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1908

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PART ONE

*Relation of the Government and
the Public to Corporate
Development*

THE ANNUAL ADDRESS—THE GOVERNMENT'S RELATION TO
CORPORATE CONSTRUCTION AND MANAGEMENT

BY HONORABLE PETER S. GROSSCUP,

PRESIDING JUDGE, UNITED STATES CIRCUIT COURT OF APPEALS, CHICAGO.

THE PUBLIC REGULATION OF CORPORATIONS—DISCUSSION
OF JUDGE GROSSCUP'S ADDRESS

BY HONORABLE HERBERT KNOX SMITH,

UNITED STATES COMMISSIONER OF CORPORATIONS, WASHINGTON, D. C.

AMENDMENT OF THE SHERMAN ANTI-TRUST LAW

BY THEODORE MARBURG,

BALTIMORE, MD.

THE GOVERNMENT'S RELATION TO CORPORATE CONSTRUCTION AND MANAGEMENT

BY HON. PETER S. GROSSCUP,
Presiding Judge United States Circuit Court of Appeals, Chicago.

I do not purpose to use up the time you have given me for this address in any discussion of my subject that would be merely juridical; that will be left, so far as I am concerned, to those who approach the subject from the standpoint of the jurist only. Nor do I intend to deal with the subject on the supposition that you wish a detailed thesis on the scope and limits of government upon the thousand and one points at which, in practice, government and the management of corporations come into contact; that I shall leave to those who write the guide-books of corporate practical life. What I purpose doing—and in so doing am conscious that I may be departing from the specific subject in the mind of those who invited me—is to utilize this occasion, and this audience, and the greater audience that this Academy reaches, in an effort to point out, not so much what should be the scope and limits of governmental interference in the management of the corporations, as they exist to-day, as what should be the purpose, as well as the scope and the limits of government, in its construction and management of the corporation of the future. For I take it, it is just as much the province of political and social science to look ahead as to look along the way—to forecast, and even to aid in foreordaining, the great political and social developments of the future, as to take stock of the present. To that end I shall try to lay down first the structural principles on which the corporation of the present should be reconstructed into the corporation of the future; secondly, the fundamental object, social, political and economic, of such work of reconstruction; and, lastly, the scope and limits of governmental interference in bringing that about. If the taking up of the subject in this order has the appearance of putting the remedy before the evil to be remedied and the power of government to remedy—in other words, of putting the cart before the horse—my answer is that in setting

forth as well as I can what I regard to be the fundamental evil of the present day corporation policy, and the power of government to cure it, I wish you to be bearing in mind constantly, not only the pertinency of the changes that I suggest, but their simplicity also. Or, to put it in another way, I do not wish, while I am setting forth the deep ultimate effects that the present corporation policy of the country is having upon the political and social fortunes of the people, to have you carrying along in your minds the feeling "So it is; all that is true; but how can it be helped?" For it is my judgment that it can be helped, and that the first duty of American statesmanship that is really in earnest is, not to use up the reformatory energies of the American people in storms and counterstorms of blind accusation, but, having intelligently uncovered the evil, to proceed to lay the axe at the root.

(a) First, then the structural principles on which the corporation policy of the country should be reconstructed. In this country the corporation is a creature of the executive department of the several states, and issues out of such department almost as a matter of course. Neither the object for which the corporation is formed, nor the amount of its capitalization, nor the character of the securities issued, commands any preliminary attention other than such as is merely perfunctory. Put-your-nickel-in-the-slot-and-take-out-a-charter, is the invitation that the states extend; and in line before the slot machine—entitled, too, to an equal place in the line—are the corporate projects conceived to defraud, as well as those that have an honest purpose. Neither is detained by so much as an inquiry. For indifference such as that, I would substitute, *at the very threshold of the corporation's application for existence*, an honest, careful inquiry, by some tribunal of government—the inquiry being whether the project should be incorporated at all, and if so, upon what terms. Take, for example, the Northern Securities Company, dissolved by order of the United States Circuit and Supreme Courts. Had application to organize such a company been made to a tribunal that gave the matter judicial investigation—the government being represented by counsel on whom devolved the duty of seeing to it that no corporation contrary to law or public policy should be launched—the application, presumably, would have been refused. What honest project can object that the inquiry should take place before, rather than after, the event? One of the claims on public approval that

the administration of Mr. Roosevelt justly puts forward, is that he is diligently pursuing the thief after the horse is stolen. Why should not the stable door be locked *before* the horse is stolen?

(b) The corporation as at present organized by the states has license to issue all the securities it chooses—securities whose place in the corporate geologic stratification no ordinary mind can locate. Out of this have come the many instances of capitalizations that serve no purpose other than to exploit with one hand the consuming public, while baiting with the other that portion of the public, which, with hard-earned savings, is looking for some opportunity to help itself along in the race of life. No honest project needs license like that. Let the initial securities issued be related in a fair business way to the actual values put in. Let this be subject to careful inquiry before the securities are issued.

(c) Incorporated enterprise, just as private enterprise, should be given room to grow. A dollar turned into two, ten, twenty, if turned honestly, wrongs no one. "Go forth, increase and multiply," is a command without which economic progress would not be. But in all this there is no need that the corporation should initially capitalize a projected success, that if it exists at all, exists only in the future. Let the securities issued on account of unusual expected success be issued only when success is established; and let them be fairly related, as the enterprise grows, to the increased value of the actual earning power developed. I can see no reason why in any honest enterprise, the question whether additional securities shall be issued, should not be made the subject of judicial inquiry.

(d) But the restriction of capitalization to figures that are fair will accomplish little, if the declaring and paying of unearned dividends be left to those who are in control of the corporations; for it is not on the par value of securities, but upon the size and regularity of dividend payments, that the public makes up its judgment as to values; and it is not on mere capitalization that the schemer in corporate securities counts, but upon his ability to make the public believe that the capitalization has an earning power. Take the well-known case of some of the Chicago traction companies. When organized twenty years ago these companies put into operation a street railway system which, on its physical side, was one of the best then in existence. Street railway traffic in the City of Chicago was such that out of its earnings the system, besides paying interest

on actual money invested, and a reasonable return upon the project as a business venture, could have been kept up to the highest standard, so that it would have continued to be one of the best in the world. But such was not to be, for in addition to the securities issued for the money actually invested, a flood of other securities were issued; and to make these good in the hands of the promoters, the chief thought was naturally concentrated, not upon keeping up the system as a carrier of passengers, *but of keeping up dividends upon such promotion securities as would enlist the interest of the stock market*; for without dividends the securities would have remained near zero, and that, too, irrespective of how small the issue was. But with high dividends, paid year after year, until they were no longer questioned, the promotion securities rose in the stock market to par, to double par, and beyond that, irrespective of how large the issue was. It was not the capitalization, but the high dividends regularly paid for a long period that did the trick; not real dividends in any honest application of that word to earnings, but trick dividends—dividends that stripped the enterprise of its power to keep up with its public duty; that let the enterprise gradually but surely run down; and that borrowed millions for dividends on the top of the depletion. Indeed, the whole transaction was a moral crime—a crime that robbed honest men and women of the accumulations of a lifetime—a crime that is not fully expiated either by arraigning before the bar of public opinion the men who got away with the plunder. I arraign, *as accessory before the fact*, the people of the great state who, scrupulously honest in their individual dealings, issued to the projectors of this crime the ready-made corporate weapon without which the crime could not have been committed.

(e) One thing more in the line of structural principles. The first duty of every enterprise, incorporated or private, is to secure to the capital invested its eventual safe return, while paying on it from time to time, after payment of operating expenses, such fair returns for its use as the nature of the venture suggests. That is what capital always has the right to ask. But this having been accomplished, there are some enterprises now that take labor and management into partnership in the further disposition of the fruits of success. That kind of partnership is not compulsory, and is not usual. I would not make it compulsory; but I would try to infuse into

the corporation of the future, an incentive and a spirit that would make it more usual—that would give to the workman, the clerk, the employe of every kind, an opportunity to individually share in the growth of the enterprise to which he is attached. This is not a mere philanthropic dream. The spirit will come when the employe feels that what he gets, he gets as a matter of contract, not as a matter of gift, and that he is as secure therein as is the corresponding interest of the employer; and when the employer wakes up to the truth that as it is not by bread alone that men live, it is not for bread alone that men put forth their best work. There are many ways that the incentive may be supplied, a possible one being such modification of the proposed income or inheritance tax, if we are to have such tax, that a distribution of the fruits of success among those who, by their labor, have contributed to the success, would be accepted as a partial discharge, at least, of the tax that success otherwise would have to pay into the treasury of the government. Indeed, every honest expedient should be employed toward interesting, in the proprietorship of enterprise, the men attached to the enterprise. As between subjecting success to the obligations created by an income and inheritance tax, or to the obligations of a wider diffusion of the permanent fruits of success among those who by hand and brain contribute to it, the former is the step toward socialism, while the latter is individualism of the highest type, fitted to the times in which we live.

The detailed form that this work of corporate reconstruction should take, in accordance with the structural principles laid down, would be best performed, perhaps, by a national commission. Such commission would have for precedent the work done by Germany thirty years ago, a corporate reform that has almost disarmed German socialism, except as *it is* now an agitation against the unjust land laws of that country. Indeed, both in Germany and in France, the workmen and other employes of large industrial enterprises are rapidly acquiring individual proprietorship in the particular industry to which they are attached—a development that transplanted to this country while not even tending to diminish wages here, would be greatly helped along by the fact that wages here are higher than anywhere else in the world.

That brings me then, to the second point—the *fundamental object*, social, political and economic, of the work of corporate

reconstruction. In any treatment of this point, I shall put before you three leading facts that may not at first sight appear to have much relation to each other, but that in the end will be seen to be so co-related that they cannot be considered apart in laying the groundwork for the corporate reform that lies before us.

The first of these facts is the instinctive trait of the Anglo-Saxon, inherited by the American, and enlarged and deepened in him, to have a place that is ALL his own, in the political, the social, and the industrial structure of which he is a part—opportunity for individual achievement—liberty of individual action. In an introductory essay to one of the editions of "Parkman's Histories," John Fiske portrays this trait in comparing the colonies of France, planted by Louis the XIV, with the New England colonies. "In Canada," says Mr. Fiske, "the protective, paternal, socialistic or nationalistic theory of government—it is the same old cloven hoof under whatever specious name you introduce it—was more fully carried into operation than in any other community known to history, except in Peru. No room was left for individual initiative or enterprise. All undertakings were nationalized. Government looked after every man's interests in this world and in the next; baptized and schooled him; married him, and paid the bride's dowry; gave him a bounty with every child that was born to him; stocked his cupboard with garden seeds, and compelled him to plant them; prescribed the size of his house, and the number of horses and cattle he might keep, and the exact percentages of profit he might be allowed to make; and how his chimneys should be swept, and how many servants he might employ, and what theological doctrines he might believe, and what sort of bread the baker might bake; where goods might be bought, and how much might be paid for them. Unmitigated benevolence was the theory of Louis the XIV's Canadian colony, and heartless economy had no place there."

"The struggle between the machine-like, socialistic despotism of new France," continues Mr. Fiske, "and the free and spontaneous vitality of New England, is one of the most instructive object lessons with which the experience of mankind has furnished us. The depth of its significance is equaled by the vastness of its consequences. Never did destiny preside over a more fateful contest; for it determined what kind of political seed should be sown all over the widest and richest political garden plat left untilled in the

world. Free industrial England pitted against despotic militant France." And free industrial England won—France, with her paternalistic theories of government, retiring from the continent amidst the ruins of her failure.

The most conspicuous product of this Anglo-Saxon trait, carried forward into the experiences of the people of the United States, is our agricultural proprietorship,—the fact that the farming lands of the country are held in small independent holdings by the people who do the farming,—a trait that was recognized and helped along in the settlement of the great public domain by the pre-emption and homestead laws of the United States. And out of that wide diffusion of proprietorship has come a distinctive type of the world's farmer,—the American farmer,—undoubtedly the strong heart and the enduring hope of the republic.

Another product, until the corporation came, pre-empting for itself almost the whole industrial field, was the American mechanic—the carpenter, the saddler, the gunsmith, the whole run of men attached to the trades—who not only operated his shop, but individually owned it, and thus made a place for himself, as an independent proprietor, among the other proprietors in the community. One of the most far-reaching and dangerous consequences of the introduction of corporate life is that this kind of wide-spread individual proprietorship has almost entirely disappeared.

Still another product was the independent citizenship that came out of this instinctive trait in every man, whatever his place in the community, to have a man's place in the affairs of which he is a part—the individual character that goes with the consciousness of individual independence. Lincoln was a type of this. Lincoln would have been almost impossible in any other country. Like many other great men scattered through the world's history, he was denied the college-bred start, that in the make-up of personal character is the chief value of the collegiate ready-made formulas—was left to his own native resources to find social, moral, and political foundations on which to build the structure of his individual character. But with this difference, that in free America, the great character thus self-built, grew up a constructive and conservative character, in harmony with the best constructive energies of its day, while great similar self-made characters, in countries where political and industrial freedom do not prevail, have

usually allied themselves to the revolutionary tendencies of their times. What Lincoln was, in a superlative degree, millions of Americans, past and present, have been in only lesser degree—types of the citizenship that is produced out of a political and industrial civilization that gives to the instinctive trait of individuality room for full play. So much for the first fact.

The second leading fact is the sudden bend in the road on which, within our own time, this dominating individual trait has come. When the great new industrial domain that is the main material achievement of this generation of men, *as fast as it was building*, went into corporate form—industrial American *individually* built up transformed into industrial American *corporately* built up—a crisis in the development of our civilization was reached. There are said to be in America more than four hundred thousand corporations; when the government was founded there were less than thirty. The people in America, who are dependent upon the treasuries of corporations for their daily bread, number nearly forty millions; when the government was founded all the employes of all the corporations would not have filled one of our larger halls. The American who would in this day have a part in the proprietorship of his country's industrial property, cannot, as formerly, acquire some individual concrete thing, or set of things, upon which he can lay his hand, and say: These are mine. He who still seeks in this day to have a proprietary part in the country's industrial domain, can have it only through some intermediary corporation—the corporation being almost the sole intermediary between him who seeks to own and the thing to be owned. All told, what other changes that one can imagine, could be so far-reaching in their effect upon the underlying conditions upon which our republican idea of government was originally founded.

The third leading fact, largely the effect of the changes I have just described—the practical elimination of one-half of our population out of a proprietary share in the country's property—is based upon the statement in the last annual report of the Comptroller of the Currency, that there are in operation in the United States twenty-one thousand three hundred and ninety-six banks and banking institutions, with local deposits of twelve billion six hundred twenty-eight million seven hundred and twenty-seven thousand sixty-five dollars. This does not include redeposits by one

banking institution in another; nor does it include the large sums held by life insurance companies, in trust for their policy holders; nor is it the sum total, as some conclude, of the many deposits of a given period, thus duplicating themselves many times, in any active times; but it is the sum the banks and banking institutions owe, at the close of some designated day, on account of the deposits. What this huge total of nearly thirteen billion dollars represents *is the individual wealth of the American public, which, uninvested in the property of the country by the depositors directly, is put by them into the financial institutions of the country, from which it is, of course, eventually taken out for investment, chiefly by those who borrow it for that purpose.*

To some extent these deposits represent what we call the working capital of the country—the particular amounts that the merchant, the manufacturer, the railway company, and other individual depositors always keep on hand in bank, to meet their current needs; and to some extent these deposits are kept in the bank vaults as reserve. But compared with the whole, neither this reserve nor this working capital is considerable. Inquiry of one of the greatest of the railroads, whose securities at market values at the time of the inquiry were between three and four hundred million dollars, disclosed that that road carries an average bank account of about one million, or less than one dollar for every three hundred of its market value. Inquiry of a leading merchant shows that his average bank balance is proportionately larger than this, but considerably less than one dollar in one hundred of the value of his establishment. The largest average bank balance carried, as working capital, that I have discovered, is that of the largest manufacturing corporation of the United States—the United States Steel Company—a corporation that beginning with the raw material, turns it over again and again until the finished product is delivered to the purchaser—in that way plainly calling for the largest kind of cash capital. But even here the ratio of bank balance to the total value of the properties is only one in eighteen; so that, assuming that the enterprises of the country that require distinctive working capital are of the value of fifty billion dollars—nearly one-half of the country's entire wealth—the bank deposits representing such working capital cannot much exceed one billion of the nearly thirteen billion dollars that constitute the total of

the deposits—an estimate unaffected, too, by whether such working capital is first borrowed from the bank and then redeposited, as is often the case, or is in the first instance deposited out of the depositor's own ready means. The truth is, that the great bulk of the thirteen billion dollars—a deposit without example anywhere else in the world, and without example in any previous period of the world; a deposit that has grown more than five hundred per cent since 1880 while population and wealth have not grown over sixty per cent—is either utilized by the banks themselves, in their business of buying bonds in large quantities and selling them out at retail, or is loaned by the banks to those who are doing the actual business of the country, and carrying the corporate securities of the country. Senator La Follette, in his recent speech, was not far from right, when he said that the domain of incorporated property is in the control of a few men. The numbers the senator gave, and the names, may be incorrect, but compared with the eighty millions of people that make up this nation, the substance of what he said was true. But mark the word "control." Senator La Follette does not say that the "wealth" of the country is in these few hands—not even the wealth upon which the domain of incorporated property rests, for its financial foundations. Were he to say that, he would be far wide of the truth.

Stated in another way, the American people have to-day in bank, a sum of money unemployed for investment directly by themselves, but employed by a comparatively small borrowing class, that nearly equals, at present market prices, the value of all the railroads of the country put together, stocks, bonds, and all; and that increased by what the people of the country individually hold, in the way of bonds, stocks and other corporate securities, constitutes almost the entire wealth on which the corporate business of the country actually rests. Indeed, were it possible for all the banks and saving societies to liquidate at once, paying back to the depositors, at their present market prices, the corporate securities into which, through the small borrowing class, a great part of these deposits have gone, there would immediately turn up throughout every quarter of the country, and in direct possession and ownership of those of our people who have saved anything at all, in addition to the corporate bonds and stocks already held by them, so large a part of the remaining corporate securities, that it could be truthfully said

that the owners of the property of America were the people of America—the property that is incorporated as well as the property that is unincorporated. Especially would this be true, were we to add to that what the clerk, the engineer, the employe attached to every industry, would get in the way of a proprietary share or dividend were an enlightened and just system of proprietary diffusion of property once entered upon.

But, while this statement shows that the American people, in the ordinary walks of life, still own the actual wealth of the country, as that wealth is found *at its sources*—the deposits in the banks being not by the rich men (who are borrowers of the deposits), but by the Americans in the ordinary walks of life—it shows also, that the industrial proprietorship of the country is not a direct proprietorship by the people at large—is, indeed, exclusive of corporate bonds, a proprietorship by the few, upon the wealth of the many, poured through the financial streams into the money centers; or as Mr. Jacob Schiff puts it, the rich men of New York are the product of the great financial reservoir that the little mountain streams are continually feeding.

Here, then, we have these two great facts: (a) The instinctive trait of the American to conduct industry along the lines of industrial liberty, and to have a *direct individual* part in the industry thus created; and (b) the almost complete submergence of that trait, in the new great incorporated domain, in the service of which nearly one-half of our people are compelled, by the conditions of the times, to serve out their lives. And out of this have come those phenomena that already mark our industrial system and our political prospects as things altogether different from the ideas that prevailed before the corporation came.

Let me hastily run over these phenomena. First, there is the so-called trust. The life principle of the trust is the gathering into one of what would otherwise be competitors—the suppression of competition. And more than from any other cause, this has been accomplished by gathering together, into the hands of the few (themselves the promoters of the so-called trusts) the financial resources of the entire country. Can competition be substantially restored until the capital of the country, springing as it does from every quarter of the country, and from the energy and frugality of all her people, is at the call, not of those who would

suppress competition, but of those who would encourage it? And what hope is there that competition will ever be substantially restored until the corporation, the only medium through which capital can be effectually wielded, becomes in the eyes of the people, *a trustworthy medium through which to work out the people's instinct to have a direct individual part in the proprietorship of the country.*

Secondly, there is this other phenomenon, largely economic, the inherent liability, as things now stand, to sudden and unreasoning panics, such as is illustrated by the panic of last autumn, the industrial effects of which are still upon us. Let me illustrate what I mean by taking the example of a manufacturing concern that six months ago was one of the largest in its line, and one of the most prosperous in the country. To-day it is in the hands of receivers. The change is not due to loss of property, or loss of business orders; its property is the same as before, its business orders almost as large as they were before. The change was due solely to the fact that when the recent wave of financial uncertainty passed over the country, this concern was doing business, not on the stable basis of a paid-in capital, as would have been the case had its capital been invested capital, but upon the basis chiefly of a borrowing capacity at the banks—a borrowing capacity always uncertain and fluctuating, which, in the case of this concern, was cut down in a single day from three millions to two millions, thereby as effectually cutting down the productivity of the concern as if a million dollars worth of its property had been suddenly lost by fire or other catastrophe. Indeed, outside a few hundred thousand dollars represented by actual invested capital, the entire property and equipment of this concern, was this fluctuating borrowing capacity at the banks.

Now one of the most important business facts that stare the country in the face to-day, is the fact that this business concern and its troubles, are typical of hundreds of other concerns and their troubles, throughout the country. The banks, taken as a whole, are sound; no banking system was ever sounder. The people in the ordinary walks of life are not in debt; never before has this class of people been so free from debt. The people in the ordinary walks of life are richer in their own right than they ever were before. It is the people in the ordinary walks of life who have furnished, and who

still own, as I have already said, the nearly thirteen billion dollars of bank deposits upon which the business and corporate activities of the country have chiefly drawn for their financial foundations; and were the banks to pay off these people, not in currency, but with the commercial and corporate securities into which the bulk of these deposits have gone, the proprietorship of the country—the direct proprietorship of the commercial and corporate enterprises of the country—would be in the immediate possession of the people free from debt. There has been no general over-production, such as in 1893. A foreign trade, constantly expanding, lies open before us. All the normal conditions for continued prosperity seem to be in sight. Yet during the past few months industrial activities have greatly narrowed; and for a year or so, as in the case of the business concern to which I have referred, are bound to continue narrower than through the years just past—bringing along with this condition of things, as one of its direct results, greatly narrowed profits and a narrower labor field.

In looking for the cause of all this, there are many who blame it upon our currency system—upon what they call the inexpansibility of the currency; others blame it on the rich men of the country—an artifice of Wall Street, they say, to counterfoil the policies of the President; and still others blame it on the President—the legitimate outcome, they insist, of the policies for which he has been standing. In my judgment, none of these are the real originating causes. A currency as expansible as any sane statesman or banker ever advocated, would not have prevented the disturbance that has taken place. The rich men of the country have never been foolish enough to deeply imperil their own interests that they might counterfoil the political plans of another. And the disturbance would have been just what it is, other conditions remaining what they are, had Cleveland, Harrison or McKinley been President instead of Roosevelt. To reach the originating causes, the search must go deeper.

The real cause that lies at the bottom of this industrial disturbance, is the same cause that has lain throughout all our years of prosperity, at the bottom of the people's unrest in the midst of prosperity—the tremendous shift that has taken place in this country, away from individual participation by the people of the country in direct ownership of the industries of the country. The fact that though our great industrial structures, railroads, manufacturing con-

cerns, commercial enterprises, are built in large part upon the wealth of the *ninety and nine* deposited in the banks, their immediate financial foundations are the capacity to borrow of the *one*, who borrows these deposits from the banks. The real cause of this shift away from direct individual investment—this shift of our industrial structure from the solid basis of a stable, paid-in invested capital, to the sands of a capital fluctuating with the money market, is the *inherent ineffectiveness of the present-day corporation as a medium of ownership*—the corporate untrustworthiness that prevents the people in the ordinary walk of life from making any direct individual investment in corporate enterprise. But for this, much of the thirteen billions now on deposit, would be in the direct ownership, by the people at large, of our great corporate properties. But for this, the capital that carries our great corporations, would be a stable capital, unexposed to these waves of uncertainty that periodically sweep over a people whose possessions are largely in the keeping of others. But for this, the banker himself would be saved the temptations under which some of them have fallen. But for this, the money centers of the country—the places where individual accumulations are transmuted into property investments—would be, not in Wall Street wholly, but largely in the neighborhoods in which the accumulations arise. But for this, the disturbance that now encompasses us would not have been.

Then, again, out of these new industrial conditions have come this other phenomenon, not economic merely, but social and political—something that goes to the foundations of our future as a republican people—the *distinctly unfriendly attitude of the American mind toward everything that is incorporated*. For failing to distinguish between the corporation abstractly, as a medium through which to wield our national energies, and the particular corporations that have abused that function, we look upon incorporated property, merely because it is incorporated, as the foe and oppressor of the individual man. Realizing that as things are now, few of our farmers, and few of our working men, and few of our small business men, and few of our clerks, have any direct part in corporate proprietorship, we regard corporate proprietorship as inherently an alien proprietorship—something apart from the people at large. Were you to ask if there were not a domain of proprietorship still open to the farmer who wishes to transmute the prosperity of the

year, into a property that is permanent, I must answer, yes, the farm lands of the country; but the farm lands only. Is there not a domain of proprietorship still open to the working man and the clerk? Yes, the savings banks and the little homes; but these only. Is there not a domain of proprietorship open to the ordinary business man? Yes, the little individual business ventures; but these only. In the great incorporated domain—that growth of our country which more than all others combined represents the country's growth—neither the farmer, nor the working man, nor the small business man, has either practical opportunity or interest, other than as incorporated enterprise may affect prices and wages. And it is upon these unrepudican foundations—these unstable sands—that the American corporation, as an American institution, now rests.

And what is the result? An open field to every species of enthusiast or demagogue to successfully appeal to a people's natural jealousy of anything that is alien, any institution that is not a part of their own life and aspirations, any development of either power or property that does not include and represent the people themselves. Under the people's demand that the so-called trusts be curbed—a demand that has some reasonable foundations—there runs a feeling much deeper than any mere fear of what, in an economic way, the trusts may do. Under the demand that the trusts be punished, there runs an instinct much deeper than a mere determination that the law be enforced. These demands are sincere and natural, but they do not account for the widespread feeling against the corporation that now prevails. That deep and widespread feeling is the offspring of the national consciousness that *somewhere*, in the fundamental relations of the people at large to the great new industrial domain, there is *something* that is not in accordance with our republican institutions—that in some way, in this new great domain, one of the deepest of human instincts is suffering denial.

A few weeks ago, at Boston, the ex-governor of one of the great states, in a brilliant speech, took the President to task for what he considers the President's mistaken policies. But like the waters of the artificial fountain, played upon by electric colors, the speech ceased to be impressive the moment it was uttered—brilliant though it was, it failed to reach solid ground. The President, on the other hand, overheated as he becomes in some of his

antagonisms, indiscriminating in some of his denunciations, subtle and purposeful as his appeals are, nearly always reaches solid ground. Whether he knows it or not, he always starts from, and comes back to, the abiding national consciousness, that somewhere in the great new industrial domain in which we live and move, there is something that is wrong—that somewhere some human instinct is being pinched.

Somewhere, something is wrong. The President says that fundamentally the country is sound. Governor Hughes says that, morally, the country is sound. So it is, if by that we mean that fundamentally and morally the *purpose* of the country is sound. But what government is to political power organized, the corporation has become to modern industry organized. The corporation is the organized form through which modern industrial energies exert themselves. Would that republican form of government be sound that denied to the people, fit to exert political power, and instinct with a desire to take part in it, all practical opportunity to take their individual part in it? Would a government, republican in form, but oligarchic in actual outcome, be a sound form of republican government?

The corporation, as the organized form of modern industry, taps the country's individual resources, from end to end, for the financial foundation on which to rest the fulfillment of its energies. Is a corporate form of organization sound, that, dependent on the people for the resources that give it life, denies to the individual creators and owners of these resources, instinct as each individual is with ambition to have a direct individual part in his country's industries, all practical opportunity to thus take part? Incorporated property utilizes nearly one-half of our wealth, and determines the place in our civilization of nearly one-half of our people. The promise of the law to the ear is that it is open to all on equal terms. But every man who knows anything about corporations knows, that in actual practice, this promise is broken. Can any corporate form of industrial organization, not actually open to all on equal terms, endure in a land where all the other institutions of government are open to all on equal terms? Can any corporate form of industrial organization, oligarchic in practical outcome, stand side by side with a political power wielded by the people at large?

Do not misunderstand me—there is no way known before men or under heaven to legislate men into the possession either of *power* effectually exercised or of *property* securely possessed. All we can do, by legislation, is to open the door—to hold out the opportunity. But that done—honestly, effectively done—as it has been done in opening the door to political power—I rely on the instincts of the American to do the rest.

I once stood on a battleship, marvelling at what the lightnings did. They lifted and lowered the anchor; they ran messages from the pilot house to the engine room; they lifted the ammunition from the magazine to the guns; they loaded the guns; leveled them to the mark aimed at; fired them; they lighted the ship when in friendly waters, and darkened her when in the waters of the enemy. They swept the seas with their Marconi equipment for a thousand miles around in search of whatever tidings the search of a thousand miles would bring; and through it all, the lightnings remained as free as the lightnings that play in the summer clouds. The genius of man has not harnessed the lightnings—they work out his task only because the genius of man has given them the material agency, the open door, through which to work out their own inherent instincts.

What government is to mankind politically organized, I have already said, the corporation, as an intermediary, is to modern industry organized. It is the pride of free institutions that they have diffused among the people the political power of the mass. But that is not the *secret* of successful free government. The secret of the success of free government is, that by opening to the people the door to power, there has been awakened a universal instinct among men that, in turn, created the capacity to successfully exercise that instinct; so much so that it can be safely said that successful government of the people, by the people, for the people, is not the product so much of the institution itself, as of the opportunity that the institution opens up. What can be done with the political instincts of mankind, can be done with this other instinct so deeply imbedded in human nature. In Europe, the work of getting the people at large into direct participation in the proprietorship of industrial properties has already begun—the pressing problem with their most enlightened statesmen being now, how to get back the people into the proprietorship of the soil.

In America, the people at large have always been the direct proprietors of the soil—the pressing problem here being how to get back the people into direct proprietorship of the industries.

It is for the reconstructed corporation then, as *an effective trustworthy medium through which to work out one of the deepest and most insistent of human instincts*, that I speak. I hold it up as the ultimate fundamental solution of the merely economic problem of competition. I hold it up as the final antidote of the kind of industrial disturbance in which we now are. I hold it up, above all other considerations, as the only fundamental and lasting cure of the social and political problems that are pressing upon this generation of men to solve.

This brings me then to the third topic of this address, the "Scope and Limits of Governmental Interference in Corporate Construction and Management." The first inquiry is the scope and limits of government, independently of whether the government be that of the state or nation. To flesh and blood, born out of the loins of nature, and entitled, independently of the state, to life, liberty and the pursuit of happiness, the chief function of the state is that of the organizer and preserver of justice and order. Of flesh and blood the state is not the creator. The corporation, on the other hand, born out of the loins of the state itself, is an artificial person, created by the state. It has no natural rights. Between the corporation and the state, the relation is that of creature and creator; and because of this, apart from the obligations of the state to carry out its engagement to its corporate creatures now in existence, the state is under no obligation of any kind, constitutional or legal, to the corporations of the future—may make them, may mold them, may withhold them altogether, according to its will. To corporations now existing, the state is bound by the doctrines of vested right—to the corporation of the future, the state is not bound at all.

This, however, is purely a juridical view. From a practical standpoint it is not the one in which we are interested; for as an agency of industry, and a form of proprietorship, the corporation is here to stay, and the corporation of the future is as certain to follow the corporations of the present as the men and women of flesh and blood of the future will succeed to those who are here now. So the inquiry is not so much to what limit the government

may lawfully go in interference with the management of existing corporations, or what government may lawfully do in the construction of the corporation of the future, as, bearing in mind the kind of civilization of which we are a part and product, what *ought* the government do, in the way of corporate construction and management. What *power* should be given to government, what *restraint* should be laid upon it.

The theory of our government, as I have already shown in my quotation from John Fiske, is that the greatest attainable industrial development is only to be had under the greatest attainable liberty to the individual man—that it is in the atmosphere of freedom that men do their best thinking; organize what is at hand with the best results; do the best work. And that conception of government in relation to industry is nature's law also; for, when, at the beginning the earth, the sea, and the sky were created, there was put into each capabilities only—into the earth the waiting fuel, and the waiting ore, the primitive fruits and grains and the chemical properties that have developed them; into the sea the potentialities that steam has accomplished; into the sky the waiting lightnings—capabilities that became the commercial and industrial actualities of our age only because, at the same time, there was put into the brains and hearts of men capability to find out and utilize the capabilities of earth and sea and sky.

Thus applying the capability of brain and heart to the uncovered capabilities of nature, the world of human industry began; and thus it has gone forward. In the infinite possibilities of nature the forces that have been utilized in building up our industrial civilization might have been revealed to men without the labor and the delay of individual initiative and research. But they were not. Without free and spontaneous individual initiative and research, these forces would never have been uncovered. But for the inexorable necessity of uncovering them, by his own efforts—as children are left by wise teachers to work out their own problems—the individual himself would never have become the thinking, aspiring, developed being that he is. Indeed, the free man, and the industrial world that surrounds him, are each outgrowths of the same great plan of the universe—each, in a great measure, the product of each other. *In that fact alone*, is the sufficient proof that industrially, as well as morally and politically, men were *intended* to be free.

The corporation, to the extent that it is a thinking, organizing, working entity, has the same title to, and the same underlying need of, freedom from external interference; for within the limits I have named, the only difference between the corporation and the individual is, that instead of one brain thinking, one brain organizing, one set of hands at work, as in the individual, there are, in the corporation, one, ten, or a thousand brains at thought; one, ten, or a thousand brains organizing; ten thousand sets of hands at work—all converging to one common end. Certain it is that the character of interference, from the exterior, that would harass the individual, hobble him, deaden him, would just as surely harass the associated individuals that the corporation represents, each doing its appointed part in the common undertaking; so that the governmental interference, which if applied to the activity of the individual, would tend to destroy his productivity and usefulness, would, in my judgment, be a kind of interference, which applied to corporate management, would be a step backward, instead of forward, in the field of industrial development.

I could easily, had I the time, illustrate this kind of interference from current legislative and administrative proposals—proposals which if put into execution, would put upon the mental activity and ambitions of the country governmental fetters that would reduce commerce and industry to the conditions of slavery that Louis the XIV so disastrously imposed upon his subjects. But without stopping now, for that purpose, I pass from these, the *limits* of governmental interference, to the *scope* of governmental control that can be exercised *without* hampering industrial freedom—the kind of control that will *promote* industrial freedom by opening to the people of the country a proprietary stake in the industrial activity of which they are the chief sustaining resources.

Three considerations present themselves at this point, differentiating the corporation from the individual, and in consequence, corporate industrial freedom from individual industrial freedom. The first and greatest of these considerations is the function of the corporation, as the organized form of holding industrial proprietorship, and the necessity that it become a trustworthy medium to that end. This I have already treated at length. It constitutes the burden of this address. From the standpoint of economics, from the standpoint of business stability balanced, from the moral, the social,

and the political standpoint, this is the paramount consideration. And in the structural principles for corporation reconstruction that I have laid down, there is no more governmental interference with individual industrial productivity, than sound systems of government, or sound elections, or sound primaries, can be said to be governmental interference with the political liberty of the individual and his political productivity. In neither case is liberty or productivity repressed. In both it is simply giving to individual liberty and productivity a sound organism through which to express itself—the dynamo and the wires that gather up and convey the individual potentialities, from conditions where they are comparatively inactive and useless, to conditions where they effectively accomplish results.

The second respect in which corporate freedom is differentiated from individual freedom, is in the case of those corporations, such as railroad and other public service corporations, that bear to the public, on their external or business side, a relationship that is not wholly an arm's length relationship—the relationship of mutual obligations growing out of the nature of the grants under which the business originates and is carried on. Here, in addition to seeing to it that the corporation is a trustworthy medium for the diffusion and protection of proprietorship, it is within the scope of government to see to it also that the mutual obligations, under which both the public and the corporation rest, shall be faithfully performed. The method adopted, thus far, has been such administrative commissions as the interstate commerce commission at Washington, and the public utilities commission in New York. Without stopping to elaborate on this form of government interference—for I do not wish, by diffusiveness, to lose the emphasis I am trying to lay upon the corporation as a trustworthy medium of *proprietorship*—I shall only say that government interference, on this external or business side of public corporations, should be limited to those points at which the public and the corporation touch each other as actual parties to the grant, such as equality of treatment, adequacy of service, reasonableness of compensation. Government should in no degree—the corporation being organized and conducted as a trustworthy medium of proprietorship—attempt to dictate or control the business judgment of its managers. To insure that both the corporation and the public are held to this reciprocal obligation,

as well as to secure despatch in the settlement of differences between them, my judgment is that the deciding body ought to be a judicial tribunal, or at least a quasi-judicial tribunal such as the commissions in Canada and England, having nothing to do with, and no responsibility for, the initiation of complaints. In that way alone, it seems to me, can we preserve in this branch of our state polity the axiom of justice underlying every just system of government, that no man can, at one and the same time, be prosecutor and judge.

The third respect in which corporate freedom is differentiated from individual freedom is in those cases in which corporate organization, though not of the public character last named, rises to the point of private monopoly. So many foolish things have been said about monopoly—so many demagogues have ridden the word out of breath—that its real significance in English and American polity is sometimes overlooked. Constant as has been the attachment of our governmental system to individual industrial freedom, there never was a time when the freedom of one individual, by combination with the freedom of others, was allowed to go to the point of monopoly. Against individual freedom, culminating by combination in monopoly, the common law was just as vigilant as our anti-trust laws. Indeed were the Sherman act to be amended so as to penalize only unreasonable combinations, it would be but a re-enactment into national law of what the common law upon that subject has always been; from which it follows that it is within the scope of government to prevent or control, through corporate organization, what government has always undertaken to prevent or control, through combinations effected under other forms, between individuals. And my own judgment is that this function of government would be best administered by giving to government, in addition to its power to curb monopoly, after monopoly has been accomplished, the far more effective power of prevention before the charter is granted—a preventive method that falls in with the structural principles laid down in the opening of this address.

Thus far I have spoken of government interference independently of whether it be the interference of state or nation. That under our system of dual government the states may do the things I have suggested, if government may do them at all, goes without saying. Can this power be put also into the possession of the

nation, in respect of corporations whose business substantially is not within a state, but overrunning all the states? And can this be done *without a constitutional amendment*?

That the nation can, as the constitution now stands, enter upon a national policy for corporations engaged chiefly in commerce between the states, I have no doubt. There is no doubt, to begin with, that power to *incorporate* is in the federal government. The national charters to national banks, and the national charters to trans-continental railways, are examples of that power. Indeed the question is not as to the power of the federal government to incorporate, but the power of the federal government over the *subject matter* with which the proposed federal corporations would have to deal.

There is no occasion, it seems to me, to look for federal power over the subject matter in any out-of-the-way corners of the constitution, such as the clause to establish and regulate post roads. All the power that is needed stands plainly forth in the commerce clause of the constitution. True it is, that until the last few years, the commerce clause has not been invoked in support of such power. But that is not because the grant was not originally there; it was because commerce did not yet need the grant. It is not the commerce *clause* of the constitution that has been growing; it is commerce *itself* that has been growing. As soon as nationally incorporated railroads as instruments of interstate transportation, became a commercial necessity, the Supreme Court recognized them as instruments of interstate commerce, and, therefore, rightly incorporated under federal law. A careful reading of the beef trust injunction cases, both in the Circuit Court, and in the Supreme Court, will disclose that where in any manufacturing or commercial industry, the raw material chiefly originates in one set of states, to be manufactured in another, to be transported and sold in still others, the commerce thus resulting is commerce under the commerce clause of the federal constitution. This is all that I shall say at this time at least, upon the constitutional side of this subject, for I have already taken too much of your time, and must press on to an immediate conclusion.

Let me, in this conclusion, compress if I can into a few sentences the thought that I wish this address to stand for. This America of ours, in the embodiment of its political power, is a government of the people, by the people, for the people. Because it is such a

government, individual freedom has, without impairment, been united with centralized strength. This America of ours, as represented by its property, until the corporate form of organized property and industry came, was an America also of the people, for the people, and by the people. Because of this, more than from all other causes, the proprietary interests of America became a matter, not of class concern, as in the old world, but of genuine, sincere, individual and national concern and guardianship.

But with the discovery almost within our own time, that within this old external world, upon which mankind had lived from hand to mouth, there was an interior world of natural forces waiting to be summoned to make life tenfold easier, and more abundant for all, the corporation as *a form of organizing energy* sprang up among us. The new great incorporated domain thus raised up is already occupied, as the field of livelihood, by nearly one-half of our people, and already represents well toward one-half of the nation's wealth. Compared with other kinds of property, it is pre-eminent in the public eye. Had there come to pass *here* what came to pass in America's distribution of participation in the *powers of government* among her people; had there come to pass here what came to pass in America's distribution of her *great landed domain* among her people; had the corporate form of organizing and holding property *invited the trust and the interest* of the American people as a whole; had the corporate form of organizing and holding property held out inducements to participate as proprietors in the incorporated domain to those whose lives are bound up in that domain for a livelihood—to become proprietors as well as wage-earners—there would, of course, have been corporate questions, of one kind and another from time to time to determine; *but there would be no deep-seated corporate problem, going to the foundations of society, such as now confronts the American people.* And it is on this account that the problem, raised up by this new great incorporated domain, is preeminently the people's problem.

Thus far, in the discussion of that problem, the public mind has been divided into two camps, the avowed purpose of the one being to "exterminate" all the big corporations or so-called trusts, and the avowed purpose of the other to "regulate" them. It looks now as if, along some such line, the pending presidential election is to be fought out. Exactly what is meant by those who propose to

exterminate, I do not know, unless it be that the people of the country are to be put into a political attitude persistently hostile to incorporated industry and commerce—a political attitude that will strike the corporation a blow every time, and at every point, that opportunity offers.

Exactly what is meant by those who propose to "regulate" the big corporations and so-called trusts is a matter that but for the pending amendment to the Sherman act, said to have been formulated at conferences at the White House, would have remained indefinite and uncertain—something calculated to impress one set of minds as a big stick with which to practically put out of business the big corporations, at the same time that it was impressing another set of minds as a poultice merely, calculated to allay the people's feeling, but resulting, in practice, in no substantial interference with the corporations as they exist to-day. If the pending amendment to the Sherman act sums up what the policy of regulation is intended to do, much of this uncertainty and indefiniteness is done away with. We know, in that case, what is meant by "regulation." And let us see how far it goes towards solving the real problem that confronts the country.

The Sherman anti-trust act, as it stands unamended, makes all combinations and associations in restraint of trade unlawful; and this irrespective of whether the actual result of the combination be hurtful or helpful, reasonable or unreasonable—the public purpose embodied in the Sherman act, as it now stands, being that there shall be no combination or association in restraint of trade, even though it be plainly manifest that the combination or association be helpful, rather than hurtful, to the public welfare.

The pending amendment lets this Sherman law stand just as it is, against all combinations and associations that do not submit to the executive branch of the government, for its O.K., such full information respecting financial conditions, contracts, and corporate proceedings as may be prescribed from time to time by the man who happens to occupy the office of President of the United States. Failing to submit such full information, the combination or association remains unlawful, even though the result be not hurtful or unreasonable; but submitting, the combination or association immediately becomes lawful, except only to the extent that it may be unreasonable or hurtful; and, a year elapsing without complaint, becomes lawful

absolutely, without exception—the whole object of the pending amendment apparently being that upon making peace with the man who happens to occupy the office of President of the United States, the corporations, just as they now exist, may pursue without further hindrance their accustomed way.

But one looks in vain, from end to end of this scheme of so-called regulation, for any recognition that the *diffusion of corporate proprietorship among the people* would tend to solve the problems of competition, and the stability of enterprise; for any thought indeed, of corporate proprietorship diffused among the people; for any thought toward making the corporate form of holding property a trustworthy medium through which the people of the country might come back into the ownership of this growing domain of the property of the country; for any thought of the release, immediate or ultimate, of the great new incorporated domain from the exclusive grasp of that small class who, under existing corporate policies, have successfully pre-empted it, and who, under existing corporate policies, will continue to control it.

For one, a participant in the conference last October that appointed the committee to propose some plan of corporate reform in connection with amendments to the Sherman act, I reject this plan as a deceit—a promise made to the ear but broken to the hope. The reason why demagogism so often prevails over real constructive conservatism in the treatment of matters relating to the corporation, is that demagogism usually has on its side a certain human note—an indefinable sympathy with men and things—that that which passes for constructive conservatism often lacks. This pending amendment, as a solution by regulation of the corporation problem, lacks every essential human note—discloses no interest in men except as they are earners of bread and customers of the corporation—no sympathy with men as independent, aspiring human beings. It aggrandizes, beyond measure, the office of President of the United States, putting it within the power of that single officer of government to say what corporations shall live, and what corporations shall be outlawed, but it opens no door that will give an interest or stake, in the mighty incorporated domain, to the eighty millions of people upon whose energy that domain was built up, and upon whose wealth, in the last analysis, it continually rests. The paramount consideration of the hour, looked at from every

point of view, economic, human, and political, is to put the great new incorporated domain on republican foundations, *by making the corporate form of holding property a trustworthy medium of proprietorship*. But if this proposed amendment is to be the beginning and the end of the policy of "regulation," to which there is no alternative except the policy of "extermination," there are some of us who have no place with either policy.

But we need not despair. It was Disraeli who remodeled the politics of his country upon the demand, that between British India and the rest of Asia there should be a scientific frontier. In the wide stretches of corporate discussion now going on, there is as yet no scientific frontier. But the frontier will eventually be run; and when it is, on one and the same side, where they rightly belong, will be found those who are so little in earnest, on the human side of corporate reform, that they will accept nothing that is effective, and those who are so blinded by their earnestness that they will accept nothing that is practical; and on the other side will be found the triumphant common sense of the American people, awakened anew to the human note that men do not live by bread alone, and taking up anew the ideal of government of the people, by the people, for the people, but so broadened, that along with the government and the farms of the nation, the new great industrial domain will ultimately become, also, a possession of the people, by the people, for the people; for in that direction, and in that direction only, lies the road to a settlement that will be lasting.

THE PUBLIC REGULATION OF CORPORATIONS— DISCUSSION OF JUDGE GROSSCUP'S ADDRESS

BY HON. HERBERT KNOX SMITH,
United States Commissioner of Corporations.

After the very able and thorough discussion of general principles by the eminent judge who has preceded me, I do not care to take up general questions. I want to discuss simply and briefly certain details as to how certain things considered desirable are to be done. As Commissioner of Corporations I have more interest in the management of corporations than I have in their construction, for when the problem comes to me the question of construction has been largely settled—the question of management and conduct is the absorbing one.

I have no grudge against combination simply because it is combination. Combination is inevitable. The thing I am chiefly interested in is the use of the combination's power—not the existence of the combination, but the way it uses its power. There are two types of business men; they merge into each other, they overlap, but the two types themselves are very different. One is the business man, the captain of industry, who holds his position because he is giving better service or lower prices,—and that is the key to his position—because he is the best manufacturer, railroad man or salesman; because he is giving his attention to making or selling the best goods, to economies in manufacture or in distribution. That man and the public have the same interest. His success means our success. He can succeed only because he serves us better than the other man. That is one type.

The other type of man—and I know him very well in my investigations—is the man who gives his entire attention, not to improving his business efficiency, but to crippling the business efficiency of his competitor. He obtains railway rebates. The evil of railway rebates does not lie primarily in the saving of freight charges. The evil in a railway rebate is the effect on the competitor. Monopoly conditions are induced in favor of the man securing the rebate.

It is not the saving of expense; it is the monopoly condition which the recipient of the rebate especially desires and gets. Such a man as I speak of buys secret information from his competitor's employees or from railroads. He deliberately uses his best efforts to destroy the commercial and industrial machinery of others, and he gets all the profits that result because he is aiming to create a monopoly.

Those are the two types of men, and they represent the result of an evolutionary process. We are carrying on a process of evolution, of selection, in our industrial world, and it is with that process of selection that the government, I think, should concern itself. It is a matter of the survival of the fittest. The government wants to see this process such that the man who survives and becomes the captain of industry, who leads our great industrial forces, is the man of the first class I have described, the man who is trying to improve industrial machinery by improving his own, and who is not trying to cripple the industrial machinery of the country by crippling his competitor. We want to see that man survive who shares with us his profits. He will thus survive when the government brings our great financial and industrial forces under the law of equal opportunity.

The previous speaker very well emphasized the characteristics of this race as individualists. We do not ask the government to give us money and help. There is one thing we want it to give us, in the words of my chief—we want it to give us a square deal. In this matter of corporations we want the government to keep open the highways of business opportunity, to maintain that process of evolution which will bring the efficient worker to the top. It is perfectly obvious what that means. It means the abolition of unfair privileges, of oppressive measures, of unfair competition. What shall be our method of arriving at that square deal?

There are various remedies suggested. The one I feel will give the best results is the remedy of efficient publicity. When I came to Washington, four and a half years ago, I rather felt that publicity, as a cure for corporate evils, was a beautiful dream. I have changed my mind. If I could take the force of public opinion which is here to-night—if I had the power to state to you the facts of business so that you would understand them, grasp them swiftly, act intelligently on them—I would care little who made the law or

the corporation. That is the greatest force for the correction of any evil; that is the force we want to use for the control of corporations. When I say publicity, I mean efficient publicity. For this purpose there is little help in masses of figures, or rows of volumes. The average citizen, who represents public opinion, is not going to take time for that sort of thing. There is one thing he will read. Give him condensed, sharp, intelligible conclusions on business facts, that do not occupy more than a column of the newspaper, and he will read them. That it is the business of the government to do, through the agency of the Bureau of Corporations. Its work is to collect such information and present it in the shape of brief conclusions, absolutely impartial. The case is then laid before the final appellate court of public opinion, and we have no question of the decision.

The Bureau of Corporations is only the nucleus of what we should have. What is needed is a definite administrative system by which interstate corporations shall make regular reports, shall give this information as a matter of their own initiative to the government, in such shape that it can be digested by the government and placed before you for your consideration. That system will come.

We have before Congress, the Hepburn Bill, which is directed to some such action. I regret that I am not in a position to discuss that bill to-night. It would hardly be proper for me to do so under the peculiar circumstances of the case. I merely say that it represents very earnest and very intelligent effort on the part of able and honest men to arrive at a conclusion of this matter which will be practical—and which can be passed, which is also an essential to consider.

We have to go one step at a time, but in one way or another we are coming up to a system whereby the great corporations of the country, whose greatness is such that they are of public concern, shall report their operations to a central authority in the Federal Government in such a shape that you and I can form an intelligent and fair opinion of them. The corrective force of public opinion thus applied will give us the further advantage that this system will be a system of co-operation rather than a system of opposition. To-day, under the Sherman Law, the government and the corporate manager meet in collision, and that is the only way they meet, and the chief thing resulting from that sort of a meeting is friction. What we want is a system where they meet in converging lines, in conference,

in discussion beforehand rather than punishment afterwards, so that both the government and the corporate manager may come to the mutual establishment of the higher standard of business morals and the practical application of them, which is the most desirable thing in our corporate system.

In conclusion, I want to point out that this system, if adopted, means the utilization of one of the most valuable assets we have in this country. We Americans are a very practical, hard-headed race, and, on the other hand, we are the most sentimental race on earth. We are practical idealists. An ideal, I think, appeals to us more than to any other nation, and we have the practical faculty of carrying it out. Many of our great business men, our captains of industry, are in their way, idealists. The man who is working his life out at his desk as a corporate manager, who has more money now than he can spend on himself, is not giving his life and his energy simply for the accumulation of more money to spend for his own pleasures. He has some ideal in mind. It is the acquisition of power, the lust of strength. It is not mere gain he is after. It is something outside of himself. Once take that ideal which he has now, whatever it may be, lust of power, joy of success in the game, and turn that ideal toward the higher standards, toward the use of such power for the welfare of the public, and you have solved the great question as near as it can be solved prior to the millennium, because you have given a chance for human nature to work out along the lines of least resistance toward public ends.

AMENDMENT OF THE SHERMAN ANTI-TRUST LAW¹

BY THEODORE MARBURG,
Baltimore, Md.

Last autumn the National Civic Federation called a conference on combinations and trusts in Chicago. The presiding officer was Nicholas Murray Butler. He sounded the note of antagonism to the Sherman Anti-Trust Law, and that note was echoed throughout the three days' proceedings. I must confess I was surprised. I had no idea there was such widespread conviction that the time had come for a modification of the Sherman Anti-Trust Law. True, this law has been on the statute books eighteen years and only recently have we witnessed a movement for its modification. That is because the government has not attempted seriously to enforce it until within the past few years. We see what disaster has attended the very beginning of this attempt.

As a result of the civic federation conference there is a measure before Congress intended to correct the evils of the Sherman Anti-Trust Law. It is the Hepburn Bill. Criticisms upon the measure since its introduction into the house have led its friends to modify it in several particulars:

First, by leaving under the ban of the law the pooling of traffic by railroads while permitting reasonable rate agreements subject to the approval of the Interstate Commerce Commission;

Second, by providing for an appeal from the decision of the Commissioner of Corporations to the Interstate Commerce Commission and then to the courts;

Third, by so modifying the clause relating to labor as to remove all doubt about the boycott and blacklist still coming under the prohibition of the Sherman Law.

That law, it will be remembered, prohibits all combinations in restraint of interstate trade whether such combination be reasonable or unreasonable; it makes no distinction. Owing to the scale of business to-day there are very few combinations or agreements

¹Discussion before the American Academy of Political and Social Science, Philadelphia, Pa., April 11, 1908.

which may not be interpreted as in restraint of interstate trade. Many of them are thought to be necessary to the successful conduct of business in its present scope; *i. e.* are reasonable in their purpose and result. If the Sherman Law were impartially and generally enforced it would bring about chaos in the business world; the mere uncertainty as to whom it may strike has developed a feeling of unrest and concern which is inimical to the best interests of the country.

Rivalry is an important element of business, and crushing the competitor is a necessary coincident of rivalry. By superior organization or inventive genius a business man supplies commodities so good or so cheap as to cause a rival to retire from business. Has he done anything that is morally wrong? Quite the opposite. To a certain degree progress is actually dependent on him: crushing the competitor is simply eliminating the unfit. The public suffers only when the process has gone so far as to give a virtual monopoly to the triumphant party, because then the very instrument of good, rivalry, ceases to exist. In other words, while there is still no moral wrong, there does arise at this point a question of public expediency. It is on the ground of public expediency alone—not on moral grounds—that monopolies are to be prevented, if possible, by state interference. Certainly the public suffers by monopoly—and the duty of the government to put down monopoly is beyond question. The whole problem is the very difficult problem of discriminating action which will control, without ruining, the splendid business organizations that have done so much to give our country its prestige in the world of affairs.

Now, many of us have long believed that the most effective instrument in checking monopoly and keeping alive potential competition is publicity *i. e.* such knowledge of the affairs of a corporation as will enable the public to judge of monopolistic practices or unfair methods, and this is the central idea of the Hepburn Bill. The bill proposes to modify the Sherman Anti-Trust Law so as to exempt from the operation of the law, so far as proceedings by the United States lie, reasonable combinations in restraint of trade, including strikes and lockouts. It proposes to do this in the wisest way, in a negative way. As a condition precedent to the enjoyment of the benefits of the bill, corporations or associations for profit will be required to register and to furnish certain information

to be prescribed by the President, information relating to organization, financial condition, contracts and corporate proceedings. The Commissioner of Corporations is required to register all corporations or associations furnishing such information whether he approves of them or not. But after they are registered, they will be asked from time to time to furnish additional information, and if their future acts after registration are regarded as in unreasonable restraint of trade, the registration may be withdrawn. They will thus be constantly under the eye of the commissioner. It must be remembered that the bill is not compulsory. No corporation or association is compelled to give the information prescribed by the bill. But unless it does give it, it will continue under the ban of the Sherman Law, even so far as reasonable combination is concerned.

Now, what are Judge Grosscup's objections to this bill, as he stated them last night? His first objection is that the bill sets up one-man power. He complains that we are putting in the hands of the commissioner the power to stamp a corporation with legality. The term "one-man power" does not fit because the decision of the commissioner is not final. If his decision be adverse, an appeal lies, as already stated, to higher tribunals. If, on the other hand, his decision be favorable, the law department of the government is still permitted, under the terms of the bill, to differ with him and to proceed against the corporation on the ground of unreasonable restraint of trade. In other words, only "reasonable" combinations can be stamped by the commissioner with legality, and that at the risk of having his decision overturned by successful prosecution on the part of the law department. It is objected that we are setting up a bureau to do what should be left to the law and the courts. The answer is that the powers conferred by the bill are wholly negative. Under its provisions the bureau can deny certain privileges; it cannot institute proceedings against anyone nor confer definitely any rights upon anyone. With these limitations, limitations which make the powers quite different from those conferred upon the Interstate Commerce Commission and on the utilities commissions of the various states, there is a distinct advantage in partially substituting for a sweeping law which attempts the impossible, a tribunal empowered to discriminate and forewarn, a tribunal which can meet business methods with business methods.

The objections advanced are the cry, first and foremost, of the inefficient, who would break up the great industrial organizations of the day by maintaining and enforcing the present law indiscriminately against all combinations whether in reasonable or unreasonable restraint of trade. Their plea is that the principal object of all combinations is the control of prices. That is not true. The object of many combinations is profit, but that object may be reached by cheapening production as well as by raising prices. There are further combinations to effect objects wholly unconnected with prices or profits.

Other criticisms leveled against the bill represent the objections of employers whom the abuses practiced by labor unions have so antagonized that they would maintain the Sherman Law at any cost, with a view to curbing the ambitions of labor, and even crushing the labor unions completely. Such men fail to realize the vast benefits that labor unions have brought to society as a whole by raising wages and shortening hours. They fail to realize, moreover, that one of the conditions of a successful war on the very great evils practiced by the unions is that we start by being just to the unions as well as to labor not embraced in the unions, that we help labor to realize all its legitimate aims for its own improvement. Moreover, as Mr. Gompers has stated, to make labor unions unlawful is simply to turn them into secret societies with measureless powers for evil.

As already stated, the bill does not legalize anything unless it be reasonable combination. It operates only to suspend certain provisions of the Sherman Act. There is no intention to include the boycott in this exemption. But even if it were inadvertently so included, it could have no such result as legalizing the boycott, for the reason that conspiracy and boycott would still be under the ban of the common law in the separate states. Suing in courts of equity in all the separate states involves added physical difficulties but that is very different from saying that the bill, even though defective in this particular, would legalize the boycott.

The objection raised to the publicity features of the bill would be advanced against any form of publicity. In fact, the bill does not confer any new positive powers in this respect. Already at the present time powers of investigation are lodged in the Bureau of Corporations, and in two other active bodies, the Interstate Com-

merce Commission and the Law Department of the government. What return does the victim who is investigated by them to-day get? Anxiety of mind, habits of secrecy, and a growing hostility to government. Under the Hepburn Act, on the other hand, he would get a tangible benefit; in return for the information supplied he would be relieved of threatened fine and imprisonment for acts which are inseparable from business on its present scale.

Much of the criticism of the Hepburn Bill on this platform and elsewhere turns on the ever present question of centralized versus local government, a question uppermost in the public mind since the founding of the union, and one that is likely to remain uppermost to the last day of that union's existence. The fundamental consideration here, in connection with the problem we are discussing, is the utter failure of the state legislatures to deal successfully with that problem. It becomes clearer every day that the big corporations engaged in interstate trade can be controlled successfully only by an authority commensurate with the field of their activities. Improved communication has broken down state lines and the problem before us is the problem of interstate commerce. Moreover, is it true that with the exercise of greater powers by the federal government local activities are diminishing? Is there not rather a readjustment of activities without any loss of volume as regards local government? Are not the municipalities and the states themselves exercising powers which they did not exercise a few years ago? We see them turning their attention to such things as municipal ownership of water, gas and electric light, to the operation of street railways and to housing. We find them entering a much less questionable field than the above, such as the provision of free public baths, wading pools, outdoor gymnasiums and music. Under the police powers they are multiplying sanitary measures, including milk inspection and pure food laws, the suppression of smoke in cities, and are even dealing with the unsightly in the form of objectionable billboards. In the field of education the increase of local activity is enormous. Crowning the common school system we see to-day many flourishing state universities and even city universities, as in Cincinnati and New York. Corn trains are bringing to the farmer's door results of scientific work at state agricultural stations and for some years we witnessed a state actually

engaged in the sale of liquor. An example of a new municipal activity of great value is the sale of milk for infants, extending to its free distribution where necessary.

In some of these activities there is nothing whatever to prevent the federal government and the local governments working side by side. If there is any one thing that can and should be centralized it is the collection and dissemination of knowledge. Without a central organization there is danger of great waste through parallel effort in experiment and in collecting data, and corresponding waste in dissemination. As a people we have made up our minds once for all that vast empire, such as our home area alone constitutes to-day, can be maintained only if based upon healthy local government. But we are equally determined not to be so foolish as to endanger the system by carrying it to extreme, *e. g.* by denying to the central government power over problems which it alone can deal with successfully.

A further objection of Judge Grosscup's to this bill is that it lacks the human element. Now, what does Judge Grosscup mean by the human element? From the rest of his wonderfully able address, I gather that he means actual partnership on the part of labor in all the industries in which labor is engaged. Well, Robert Owen had his dreams about this a century ago. How far have they been found practicable?

Before I go on, I want to distinguish between cooperative production and cooperative distribution. The latter offers less difficulties than the former. The trouble with cooperative production is that while it may work beautifully in prosperous times, it fails utterly in hard times. When the laborer's dividends are reduced, he wants to know why, an early result being a demand on the part of labor for interference in the management. Now, productive industry is, in its nature, autocratic. The number of failures in the business world shows how rare is the talent that can handle big business operations successfully, and if you crowd this talent aside, the result will be a loss of intelligent direction, *i. e.* greater labor with less result.

If Judge Grosscup had said profit-sharing, that would have been quite another thing. You may have an institution like a great department store, where every salesman gets a share of the profits, and that may be permanent because the salesman has no certificate of

property which he can part with or on which he can make a legal or moral demand for interference. So long as he continues in that establishment he enjoys a share of the profits according to his sales. But even in cooperative distribution, if you attempt to make him part owner, what happens? Supposing to-day, in Mr. Wanamaker's establishment, each employee should be given certificates of stock; how long would all the employees in that establishment continue to be holders of that stock? Would not some of them sell it—have to sell it? Would not others, through their superior thrift, gather it to themselves, so that, as in most of the so-called cooperative stores to-day, you would soon have the few thrifty-employees owning all the stock and becoming employers while the great mass of former stockholders had lapsed into salaried employees?

The difficulty is inherent. There are some things which are dependent on time and place; but to my mind, the participation of labor as an owner in production—not in sharing profits but as an actual owner—is inherently impossible, because it involves interference with the management, which is, in its very nature, autocratic.

Now, Judge Grosscup likewise referred to the tremendous concentration of industry in the hands of a few men. Some of us, at the beginning of this movement, said that while you would have great fields of industry gathered up by a few men, the net result, provided always there is adequate regulation—I lay down that one condition, provided you have adequate regulation—the net result would be less waste of human energy, *i. e.*, cheaper things or better things for the same money, so that, in the long run, human effort would be more and more freed from the necessity of producing the material things—the things which enable men to *exist*—and be set free for the higher things, the things which enable men to live.

Now what are the indications? Statistics of 1900, compared with 1890, show increase of diffusion, and despite the caution of the Census Bureau that this showing is due to completer canvass, some very good authorities believe that the diffusion is real. The statistics of manufactures for 1905 throw no light whatever on the tendency in question for the reason that they exclude the bulk of the smaller "neighborhood and mechanical" industries (three-fifths of all the grist mills and nearly one-third of all the lumber mills in the country, for example, being thrown out from the enumeration), and

for the further reason that the census does not pretend to include the professions.

Industries which lend themselves to combination are not likely ever to be broken up unless the legislator deliberately sets to work to hamper them. On the contrary, means are likely to be found from time to time to successfully combine industries which perhaps cannot be combined to-day. The point is that this very process, aided by the growing conquest of nature in every direction, will so cheapen production as to set free the activities of a large body of the people, as already stated, for higher pursuits. These higher pursuits may take the form either of handiwork to which some feeling and character will be imparted by the individual workman, a demand for which is likely to be brought about by growing wealth and culture, or of important accessions to the professions. You may have more school teachers, painters and sculptors, more men to let imagination range in the walks of letters, more men to devote their time to the science of government.

We all realize the many drawbacks that have come with the factory system. The tendency to which reference has been made will off-set these disadvantages. While there are indications that this tendency has already set in, it will naturally be a long time, possibly several generations, before it will become important. This is perhaps an optimistic view but it is an optimism which I believe to be based on a correct reading of human history.

When we analyze monopoly we find it of three principal kinds; that which has been termed "monopoly of excellence," which is better or cheaper service and goods; monopoly based upon government favor, such as a patent or franchise; and monopoly based upon control of the supply of the raw material. No other form of monopoly can be permanent.

Now, publicity will go a long way toward dealing with the abuses practiced by these monopolies. Even monopoly which starts as "monopoly of excellence" may, after it has cleared the field of rivals, resort to exactions and become oppressive. It then becomes the duty of the state to reintroduce the possibility of competition by making it difficult for the monopoly to cut prices in a restricted area with a view to killing off incipient competition while making large profits from a maintenance of price elsewhere. We are probably not yet prepared to say to the industrial corporations that

they must follow the rule of public utilities and have one price for all comers; but if by publicity we can show great discrimination in price, public opinion is likely, in the long run, to succeed in breaking up the practice. For monopoly based upon government favor, the obvious remedy is foresight, *i. e.* proper conditions laid down when the franchise or patent is granted.

The third kind of monopoly, that based upon control of the supply of raw materials, is the most difficult to deal with. Possibly there is no remedy for it except government ownership, under which such things as mines could be leased on a royalty (not operated) by the government. Such a system would place the government in control of the situation, and publicity—the publicity we are seeking to set up under the Hepburn Bill—would show exactly what are the problems we have to deal with. To amend the Sherman Law by simply inserting the word “unreasonable” would accomplish some of the objects aimed at by the present bill, but we would be throwing away the opportunity to secure publicity of a large kind, to secure it in a negative way—not compulsory—and under a system which would be automatic and would not depend on the initiative of any department or official. This device would of course result in a much greater volume of publicity than at present, and the objection that information so given to the central government might be seized upon by the separate states and used as the basis of prosecution under state statutes, is a serious objection. It is in fact the one serious objection advanced against the bill. An answer to it has not yet been found, and it is highly desirable that one should be found because the same objection would hold against any conceivable plan of publicity under the federal power.

PART TWO

The Business Situation and Anti-Trust Legislation

EFFECTS OF ANTI-TRUST LEGISLATION ON BUSINESS

BY MARCUS M. MARKS,

PRESIDENT NATIONAL ASSOCIATION OF CLOTHIERS, NEW YORK CITY.

CAUSES OF THE PRESENT BUSINESS SITUATION

BY ISIDOR STRAUS,

SENIOR MEMBER OF THE FIRM OF R. H. MACY & Co., NEW YORK CITY.

THE PANIC AND THE PRESENT DEPRESSION

BY THEODORE MARBURG,

BALTIMORE, MD.

NECESSITY AND PURPOSE OF ANTI-TRUST LEGISLATION

BY GEORGE L. DUVAL,

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THE DRUG TRADE AND THE ANTI-TRUST LAW

BY WILLIAM JAY SCHIEFFELIN,

CHAIRMAN COMMITTEE ON PROPRIETARY GOODS OF THE NATIONAL WHOLESALE DRUGGISTS' ASSOCIATION, NEW YORK CITY.

ATTITUDE OF LABOR TOWARDS GOVERNMENT REGULATION
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BY SAMUEL GOMPERS,

PRESIDENT AMERICAN FEDERATION OF LABOR, WASHINGTON, D. C.

THE POLITICAL SIGNIFICANCE OF RECENT ECONOMIC THEORY

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EFFECTS OF ANTI-TRUST LEGISLATION ON BUSINESS

By MARCUS M. MARKS,

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The trust problem is comparatively a new one, having only in recent years forced itself upon the community for serious consideration. The legislation framed to deal with corporations is still quite crude, and the best brain of our people must be concentrated on the measures that will be required to regulate the operations of corporate business. For the tendency of our time is clearly in the direction of co-operation and combination. As particles of steel irresistibly fly together under the influence of the magnet, so do men naturally and easily get together nowadays in every common cause whether commercial, political, moral or social. Hence the discussion of the corporation and trust question becomes very important to the community and most particularly to business men.

The main purpose of anti-trust legislation is, no doubt, to restrain attempts at oppressive monopoly. Although in the efforts that have been made to carry out this purpose much harm has been done to the business community, it cannot be denied that the publicity given to the dishonest methods of certain corporations has had a healthy effect in restricting their operations and minimizing their influence. Loose systems of financing great institutions have been exposed and a higher standard of honor has been demanded, which will have a very wholesome effect not only on the corporations that have already been specially attacked, but on all others now in business or about to be formed. Recent revelations under the searching light of publicity have, however, unfortunately tended to cast a suspicion upon all corporations.

Let us try to be fair and entirely unbiased in this discussion. Unless we see absolutely no benefits in trusts let us avoid the use of the phrase "the trust evil," and allude rather to the abuses of trusts which admits of a corresponding phrase—the uses of trusts. Unfortunate misuse of terms has done much to cloud the popular mind and arouse prejudice and evoke legislation adverse to all combinations, many of which are good, instead of centralizing the

opposition on those that are oppressive and harmful. There has always been a discrimination against corporations. It may even be said that a different code of ethics has obtained, on the part of the public, in the general attitude toward corporations as well as on the part of the officers and employes in the use of the corporate funds. It is conceded that there is generally less scrupulous care shown in curbing the expenses of a corporation than there is in a private enterprise of the same character. Referring to the attitude of the public, who will doubt that, for example, many passengers enjoy free rides in "trust" cars, who, in other directions, conscientiously discharge every private obligation. General condemnation of trusts, such as has been brought out in the attempt to enforce the Sherman law, strengthens this tendency of men to assume an easy conscience regarding their obligations to corporations. This is indeed very harmful to the public morals, and particularly to commercial ethics.

Some of the business effects of anti-trust legislation we can already perceive; but in view of the very recent date of the development of drastic anti-trust measures, many of the results cannot yet be accurately computed, being rather speculative at this time. For example, as the court of last resort has not yet passed on the now famous Standard Oil fine, the effect of this action cannot be finally weighed. Business has felt part of the injurious effect, but the future is still problematical. As a general business proposition, however, it is safe for us to say that our most important anti-trust legislation, namely, the Sherman act, has already shown serious ill effects on business. There is no question that greater harm will follow the execution of its provisions in the future unless it is radically amended.

Business is based largely on credit. Credit, in its turn, depends on the spirit of confidence in general financial conditions. Whatever, therefore, injures this confidence, interferes with the free and peaceful dispensation of credit, and to that extent injures business vitally. Fire, flood, earthquake and failure of crop are among the unavoidable causes of financial loss, which must be borne with resignation. But it is not surprising that there is a feeling of indignation among the business men when otherwise avoidable losses are brought on by legislation, which, while seeking to remedy an existing evil, attacks a whole system to the embar-

rassment of large numbers of innocent men and women. This has been the unfortunate operation of the Sherman Anti-Trust Law. Instead of attacking only the evils of the trust it institutes a crusade against all corporations, and as business enterprises are now being carried on more and more by corporations, whatever attacks them necessarily attacks business in general. Instead of leveling its battery against *unreasonable* restraint of trade, the Sherman act attacks all restraint of trade, whether reasonable or not. It certainly cannot be said that all trade agreements are harmful. Yet under the Sherman act all parties making such agreements may be legally proceeded against.

Profit-sharing

There has recently developed in this country an active interest in plans for profit-sharing between capitalist and worker. Large corporations are beginning to give their employees a fair opportunity to become partners in the plant in which they are working, recognizing the fact that loyal efforts of the wage-earners contribute largely to its ultimate success. This tendency should be encouraged as a wise and democratic measure, which is bound to benefit, financially, both labor and capital and at the same time help to curb the spirit of discontent which arises from the seemingly conflicting interest of employer and employee. The sweeping onslaught on large corporations under the operations of general anti-trust legislation shakes confidence in these combinations and thus retards the development of the profit-sharing plan, which, if carried out generally, would help materially toward bringing about ideal relations in the world of labor.

The main ill-effect of anti-trust legislation on business *thus far* has been to retard the growth of the good and useful corporation, while originally intending to aim only at the corrupt or oppressive monopoly. The public has become timid and indiscriminating in view of this general attack, and will not now freely invest money in the stocks and bonds of corporations, even though these corporations be perfectly sound and of great economic value to the community. The result is that their activities have been seriously curtailed, throwing large numbers of men and women out of employment. It follows, of course, that this condition reduces the purchasing power of the people, and to that extent undermines prosperity.

Federal Regulation

The business community is unanimous as to the economy of corporations and combinations. Only when an oppressive monopoly exists is there an injury to the people. General federal regulation and control of corporations, with proper publicity, would prevent such oppressive monopoly. The modern industrial and commercial world is not composed of small circles in our various states, each independent of the other, but, on the contrary, business has so spread between the states of the Union, and the circles of industry are now so interlaced, that a uniform federal incorporation law or similar provision seems as necessary as the federal bankruptcy law, which now secures so much more justice to our business men and spares them the necessity of studying the varying laws of each of the states. It seems wise that those whose duty it would be to take charge of the administration of such an incorporation or registration law should be trained men whose term of service should not be affected by political changes. Professor Taussig, of Harvard University, expressed himself on this subject on October 24th last as follows:

"Careful administration and continuity in administration are called for. The bureau of corporations has made an excellent beginning. Both this bureau and the Interstate Commerce Commission must be completely divorced from partisan politics and must be officered by able, upright and experienced men. The term of service should be irrespective of changes in the presidential office, and the positions should be made dignified and attractive both in salary and in permanence of service."

According to the general consensus of opinion the Sherman Anti-Trust Law should be so amended that with proper registration and publicity, reasonable agreements may legally be made by labor unions, by farmers' organizations and by associations of business men. At present, there is a general uneasiness as to the extent to which such reasonable agreements may be interfered with. Our laws should not be tyrannical or oppressive. Honest enterprise should not be hampered by legislation, nor should the people of a free country have cause to look with fear upon the operations of government, so long as they are doing nothing detrimental to the interests of their neighbors. Unjust laws, the operations of which

men feel it proper to circumvent, cause a loss of respect for law in general. One who breaks an unjust law will more easily be tempted thereafter to break even a just one. Let us make sure, therefore, that our laws are just.

Future Effects

Weighing the immediate effects of anti-trust legislation or procedure on the business of the country, it must fairly be conceded that the havoc wrought by the recent crusade far exceeds the good effects thus far shown. But, looking beyond immediate results, may we not reasonably expect that after business adjusts itself to new conditions, the net result will prove to be good? There will in the future certainly be a sounder basis of calculation of values. The fittest corporations having survived, new confidence will soon be evidenced and be justly merited. There will be more publicity, more stability, more morality. The prejudice against the trust as such will gradually but surely disappear, when the personnel of the management is of the high character that will be rightly expected by the public. The new light that has been thrown on the actions of some of our corporations has revealed situations which have aroused the people to join in a loud cry for higher standards of ethics in large business enterprises. If, as we expect, that cry is heeded, the effects of the present anti-trust legislation on business will in the end be not only of financial value to the community, but still more precious in elevating the ideals of commercial ethics. This change will affect not only the lives of the business men of to-day, but will have a good influence on the thought and conduct of the young generation now growing up and soon to shape the commercial future of our nation.

CAUSES OF THE PRESENT BUSINESS SITUATION

BY ISIDOR STRAUS,

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If it were as easy a matter to answer questions as it is to propound them, scientific men would not be held in such high regard. I fear, however, that we embrace under the heading of the sciences some subjects which, owing to the difficulty of setting up a standard, and the conflict among those who are recognized as high authorities, we are compelled to class as very inexact. Political science and political economy I venture to assert come under this head.

If fifty experienced bankers and business men were each examined before a judge, without one hearing what the other said, and the judge were asked to give his verdict as to the cause of the recent panic based upon the evidence thus submitted, I believe he would find it as difficult a problem to solve as any which had ever engaged his attention. And yet this is a concrete question which it seems at first blush should not offer such difficulties. No country has been free from panics. A crisis is reached periodically in the economic conditions of every land, but it seems to me that in no civilized country do conditions reach so acute a stage when disaster overtakes commercial prosperity as with us. And yet we are perhaps the richest nation in the world, blessed with more natural resources, greater wealth per capita, and with a population which certainly is second to none in inventive genius, energy and enterprise. Why is it, then, that a crisis develops with us conditions that no other commercial people have to face?

There is an adage attributed to one of the original Rothschilds. When he was accosted by an excited member of the Stock Exchange, at a critical moment, with the remark that the scarcity of money then prevalent would bring ruin to all industries, he is said to have replied: "Oh no, money is not scarce: securities are scarce." What did he mean to convey by this statement? Nothing else but that the man who was complaining of the scarcity of money did not

know that he could have all the money he needed if he had the proper security to offer.

And such is practically the condition in every financial center of the civilized world except ours. Last October and November, all of our banks practically suspended payment. Many a manufacturer, merchant and financier was unable to procure the necessary funds to carry on his enterprises, regardless of the securities which he had to offer, and the action and reaction of this plight accentuated the acuteness of the situation and intensified the crisis far beyond what it would have been if there had been no currency famine—for it was currency and not real money that was wanted.

I do not mean to say by this that with a perfect banking system, or a more perfect one, such as the leading European nations possess, panics would never occur, but I do say that with this unpardonable condition eliminated, much of the havoc played by a panic would be averted and normal conditions more quickly restored. And yet, fresh as is the memory of the havoc wrought during the last few months, the commercial and financial powers seem to be so much in conflict as to what steps should be taken in the revising of our banking laws that there is grave danger that nothing at all will be accomplished, simply because Congressmen are confronted with a situation which enables them to say—how should we know what you want or what you need when your wiseacres and your so-called experts cannot agree among themselves.

While the last panic was probably the severest that this country has experienced within the memory of any living man, we fortunately were not confronted with one phase of mistrust which was the chief factor in creating and prolonging the disaster of 1893, namely, the question of our standard. Then we were threatened with going to a depreciated silver basis. Still the last crisis was more acute, because the commerce of the country had grown tremendously; therefore the amounts involved were so immense that the fear of a currency famine produced such mistrust that the hoarding of it and its withdrawal from the banks, by frightened depositors, plunged every center into such a depth of despair that the sentimental effects created the gravest feature of the panic.

Remove from the minds of the community the fear that there is not money enough to go around, so that no one will withdraw from the banks what he has no use for and hoard what he is glad

to return the moment confidence is restored, and you will eliminate from any crisis in the future a gravely disturbing element which seriously aggravates and intensifies the acuteness of the situation.

Perhaps there is no country which goes to the extremes, either of prosperity or adversity, that we do. When times are prosperous and the demand for all sorts of commodities appears to be insatiable, the manufacturer enlarges his plant, the merchant extends his undertakings and the railroads try to build apace all of them unmindful of the fact that sooner or later there must come a halt to continuous, progressive growth and power of consumption, which will necessarily compel reduced production. In older countries, they are more conservative, consequently do not develop so rapidly nor lay themselves liable, as we do, to the disastrous consequences of a contraction in industrial and commercial development.

It therefore behooves us to disseminate a sentiment of greater conservatism, so that we will be content to grow by easier and steadier stages, and not expose ourselves to the danger of any setback which may prove a deluge that will sweep away in a short time the up-building of years. In other words, we must manage our affairs on such lines that when seven fat years have been enjoyed, one lean year will not consume the accumulation of seven fat years, for lean years always have come and always will come, and it is incumbent upon every prudent man to realize that while in prosperous years, when money is easy and credit without limit is at the command of those who merit it, it is unsafe to conduct business on too extended a basis, so that a temporary shrinkage in ready capital will enable him to fall back upon his own resources until the clouds which overhang the horizon are scattered.

It is true that the spirit of optimism has been the mainspring which has spurred the progress of this country with a rapidity which the annals of no other country show. But energy and push when crowned with success year after year engender a dare-devil frame of mind that sooner or later is apt to expose the shrewd planner and successful executor to dangers which play havoc with them and with their confiding followers.

Our archaic banking system is answerable for such irrational conditions as developed during the panic of last November and December of which the following is a fair example. With rates of exchange on Europe, that under ordinary circumstances would

have rendered the shipment of specie unusually profitable, we imported something like \$100,000,000 in gold. That was brought about through a currency famine, which placed bank checks at a discount, or, as it is more commonly but erroneously expressed, currency at a premium. The most optimistic view prevailing at the time construed this importation of gold, if not entirely, at any rate to a large extent, as a temporary loan which would result in its exportation again as soon as our monetary conditions became normal. More than three months have elapsed and not a dollar of the gold has left our shores.

As we look back, however, the solution is easily found. Our exports during the months of November, December, January and February exceeded our imports by something like \$450,000,000. This was brought about through a tremendous reduction in our importations, owing to merchants anticipating a diminished demand, on the one hand, and the necessitous conditions which stimulated our exports on the other. This alone, if there were no other proofs at hand, would clearly demonstrate our tremendous reserve resources and show clearly and forcefully how we are handicapped by our defective banking laws.

It has often been predicted in the past that New York City in the not far distant future would become the exchange center of the world. The experience of the last few months, however, sets back by a number of years the possibility of the consummation of this hope. So long as our money market is exposed to such vicissitudes as the experience of the last crisis brought so prominently and graphically before the world, we cannot come into our own, and we will still have to use the letters of credit on London and other European money centers for a large portion of our foreign commerce.

If a merchant desires to import goods from South America, or from China or Japan, to be drawn for at sixty or ninety days, as is the custom, such a credit authorizing the draft to be made on London or Paris is as good as the cash. The same sort of credit issued on New York is not as good as cash, as the foreign banker negotiating the same would, in making his rates of exchange, have to speculate upon abnormal conditions that might confront him after having sent the draft to New York, these would produce a rate of discount that might entail a loss much greater than the

profit he could make in the purchase of such a bill of exchange. On the other hand, the same transaction based upon a sight draft on New York would compare favorably with a similar transaction in any other monetary center.

So you will observe that the uncertainty of the monetary situation which a time draft might meet when reaching New York City practically eliminates it from the category of an exchange market, and the manifold conditions and considerations that enter into commercial transactions ramify in so many directions, of which this is but an example, that we must be content to take a second or third rate position as a financial center until we can place ourselves on a basis of sound banking, such as that on which the commerce of England, France, Germany and other modern commercial nations rests.

In conclusion I cannot refrain from adding, as a merchant of nearly a half century's experience, that the pessimist who desires to pose as a prophet had better seek another country than ours. We undoubtedly have suffered and are suffering from conditions which seem to be inseparable from a young and vigorous nation. If bad legislation could have definitely checked our progress, we surely would not have arrived at our present marvelous development. But as no man, or no human institution, is perfect, both should be measured by the balance struck after deducting the vices from the virtues, and this balance, I believe, justifies us in looking at the future with cheerful resignation, in a hopeful, yes, optimistic spirit.

THE PANIC AND THE PRESENT DEPRESSION

BY THEODORE MARBURG,
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To accept too freely the theory of periodicity of panics is apt to make us fatalists and careless of our methods and laws. It is safer and more helpful to assume that each recurring panic has its own special causes and then to endeavor to ascertain these causes. Each panic teaches us something new and this accumulating experience should in time enable us to prolong the interval of recurrence if not eventually to prevent the recurrence entirely, just as epidemics of disease, formerly thought inevitable, are now prevented.

In connection with the panic of 1907 it is difficult to discover any widespread speculation or overproduction. An examination of stock exchange lists shows that the highest quotations for many leading railroad stocks, such as the Pennsylvania, Louisville and Nashville, Northern Pacific, Chicago and Northwestern, Denver and Rio Grande, Missouri Pacific, New York Central, New York, New Haven and Hartford, and Texas and Pacific, were recorded in 1901-02. From that time down to the panic of 1907—a period of five years—there occurred a considerable shrinkage of market value in the face of increasing earnings.

Overproduction we find in a few commodities, such as copper and lumber, but the list of such commodities is short.

Another recognized cause of panics is large investments in securities which are not immediately productive, such as was the building of the trans-continental railways at a time when there was little business for them. Have we witnessed any such phenomenon in connection with the recent panic? The incorporation of private industries and the listing of their securities on the exchange effect not a transformation of circulating capital into fixed capital, but rather a transfer (when the securities are marketed) of capital from the hands of one set of men to another. Increase of railroad trackage and cars, and improvements of terminal facilities, cannot

be put in the category referred to, because, until the panic came on, the business was waiting and these improvements were immediately productive. The calamitous fire and earthquake losses of the past few years, coming as they did when labor was fully employed, must of course be regarded as diminishing productive capital. For the time being we must likewise so regard the Panama Canal and the uncompleted tunnels entering New York. But where capital is concerned the recuperative process is quite rapid. Not all the happenings referred to came together and, moreover, they acted upon, all told, such a small proportion of our vast working capital that they could have had but little effect in the direction indicated.

To explain the panic of 1907 we are forced, then, to look for causes other than the usual causes of panics. One of them we find in the strain placed by legitimate business enterprise upon the world's money supply, a strain due largely to the great opportunities of our day. For this difficulty there is no visible remedy. To endeavor to find a substitute for money in something not limited by nature is to court trouble.

But the panic was largely centered in our own country and its origin must be sought principally in local conditions. Turning to them, there immediately appears as chief among them the attitude of the federal and state governments toward a most important industry, namely, the railroads. It is probable that the attack on the railroads was the most important single factor in producing a state of mind which made possible the panic of 1907. Unquestionably grave abuses existed, but these abuses may be classed largely under the head of conduct and were unconnected with the question of reasonable rates. The people were suffering from inadequate facilities more than from high charges. They were suffering from discrimination, which favored particular interests. The interest of the public lay distinctly in the direction of permitting the railroads to continue prosperous and then forcing them by law to make use of their profits to improve the service. In proceeding to attack railroad earnings we simply postponed the day of needed improvements, for the double reason that when earnings are inadequate the railroads can neither make improvements out of surplus earnings nor command sufficient confidence in their future prospects to enable them to borrow. If this reasoning be correct, it follows that one of the effective steps to recovery

is to change the public attitude toward railroads, to let them earn money and force them to make the proper use of that money.

The next step in bowling over the investor, and with him the laborer and the public generally, was the extravagant fine on a single industrial trust. A fine such as that imposed on the Standard Oil Company is out of keeping with the spirit of modern law, which is remedial, seeking cure and prevention, and subordinating the idea of retribution and revenge. The heads of these big corporations have frequently been termed knaves; they have seldom been charged with being fools. A fine the mere fraction of that actually imposed, together with an indication of what the maximum fine might have been on all the counts, would have demonstrated effectively to its managers the power of the government to ruin the Standard Oil Company if it failed to obey the law, and the desired end would have been attained without such disastrous consequences to the stockholder and the public.

The remedy for the abuses of industrial trusts probably lies in the direction of federal control, control through license. The moment corporations are required to register under a federal statute, the government may require certain information of them, and the possibility of great reform at once appears. When attended by publicity, compulsory investigation into illegal and unjust practices tends not only to correct the illegal practices, but the unjust practices as well, and that without resort to proceedings in a court of law or even in a court of arbitration. Possibly nothing but the knowledge that these corporations can be controlled by the federal government and are being controlled by it will stop the popular attacks on them.

What applies to the industrial trusts in this connection applies equally to the railroads, although here the federal government might possibly go a step further and resort to actual incorporation of interstate railroads under federal law as distinguished from the mere licensing of industrial trusts. It may find it wise and even necessary to do more than control the practices of the railroads, to interfere, in fact, with their actual operation by insisting on improvement of the service. If the government assumes such a position, of course railroad earnings must not be interfered with.

The recent decision of the Supreme Court declaring Minnesota and North Carolina rate laws unconstitutional because confiscatory

is cold comfort for the reason that if the state and federal governments are to be allowed to proceed against the railroads to the point of confiscation it leaves but little for the investor to look forward to.¹

Another potent cause of the panic, a cause which has been generally recognized, is the inelasticity of our currency. This subject has been dealt with quite fully before this body and elsewhere during the past few months, and what I have to say to-day is simply by way of supplementing that discussion.

¹At the Chicago trust conference in October last I had occasion to deal with this subject as follows:

Let our legislators see that where there is a single track to-day a double track be laid, that existing double tracks grow to four, that grade crossings be abolished, cars multiplied, terminal facilities increased, that the penalty of men's stupidity in living in such numbers under the insufferable conditions that prevail in our great cities be somewhat lessened by compelling the railroads to suppress smoke in passing through the cities, and, above all, that the hours of the employees be not too long, so that they may give efficient service and stop the sacrifice of life on railways. To compel the railways to do these things is to compel them to benefit themselves and involves no injustice to the stockholder. I do not think we realize yet how serious this step of the federal and state governments is. The great fall in the value of railway shares in England during the past ten years is traceable

YEARLY DIVIDENDS AND PRICES FEBRUARY 1ST, OF EACH YEAR.

	Per Cent	1898	1899	1900	1901	1902	1903	1904	1905	1906	1907
Caledonian	Dividend	5	4½	4	4	4	3½	3½	4	3½	
	Price . . .	160	156	141	130	126	115	104	112	119	102½
Great Eastern	Dividend	3½	3½	3	3	3½	3½	3½	3½	3½	
	Price . . .	120½	122	123	107	105	94½	87½	89	87½	79½
Great Northern	Dividend	2½	1½	0	0	½	1	1	1½	1½	
	Price . . .	58½	63½	26½	45½	43	42½	39½	39	46	44½
Great Western	Dividend	3½	5½	4½	4½	5½	5½	5½	5½	5½	
	Price . . .	178	167½	167	146½	140	138	137	141	142	130½
Lancashire & Yorkshire	Dividend	5½	5½	4½	3½	4	3½	3½	2½	4½	
	Price . . .	148½	151½	145	131	113	108	96	108½	109	104½
London, Brighton & South Coast	Dividend	6½	6½	4½	3½	4½	4½	5½	5½	5	
	Price . . .	178½	176½	171	133½	126	128	105½	128½	130	116
London & Northwestern	Dividend	7½	7½	6½	5½	6	5½	5½	6½	6½	
	Price . . .	204½	203½	197	179	170	168	152	154½	161	153
London & Southwestern	Dividend	6½	6½	6½	5½	6	6	6	6	5½	
	Price . . .	232	222½	208	190	174	174	155	160	161	153
Midland	Dividend	3½	3½	2½	2½	2½	2½	2½	2½	2½	
	Price . . .	93	93½	81	75½	75	73	68½	68½	69½	66
North Eastern	Dividend	6½	6½	6½	5½	5½	5½	5½	5½	6½	
	Price . . .	179	181½	175	169½	155½	147	139½	139	145½	145½

directly to the power to fix rates placed in the hands of the Board of Trade, a conservative body of practical men in one of the most conservative countries in the world—conservative in the best sense. The English railroads now find themselves confronted with the necessity of making extensive improvements, including the laying of track, with no visible resources for the undertaking. . . . The consequences of discouraging railroad improvements must be still more serious in America than it has been in England, for the reason that England had her mileage and adequate trackage built when the practice of attacking earnings began.

During the past year the most serious attack on railways has come from the separate states, but it is the new powers conferred on the Interstate Commerce Commission from which we really have most to fear. The cry of the public is always for lower charges. Let this cry come up from all parts of the country to this small body of men through a series of years and what hope is there that they will succeed in withstanding it?

The problem of an emergency currency revolves principally around the question of what constitutes an adequate tax on such currency. Without an adequate tax the currency will not contract sufficiently in normal times and will therefore lack proper elasticity in abnormal times. Furthermore, without such tax there is serious danger that inferior money will take the place of good money. Two things conjointly cause gold to be drawn to a country: One is the providing of a place for gold in the currency system of the country, the other is the interest rate. Neither the one nor the other alone suffices. High rates of interest have obtained in silver countries without drawing gold to them; high rates of interest obtained in the United States before our resumption of specie payments, without sufficiently attracting gold. There must be a need for gold (*i. e.*, a gold standard and an absence of other forms of money), accompanying the high interest rate, otherwise gold will not come. Obviously the way to maintain "an absence of other forms of money" is to tax such money. If we want to prevent an issue of paper money which, if issued, would interfere with the supply of gold, we must begin the tax on such money at a rate which is supposed to attract gold so that the general rate of interest may not be interfered with beyond that point. For example, if the United States, which is on a gold basis, finds that a general interest rate of 6 per cent will attract gold, it can avoid having its gold supply affected by an emergency currency if the tax it imposes upon such currency begin at 6 per cent. A currency taxed at 6 per cent will not be issued until the general rate of interest is high, *i. e.*, until gold is being attracted; and it will not interfere with the continued inflow of gold, because the moment the interest rate falls too low, emergency currency so taxed will become unprofitable and will be withdrawn. On the other hand, currency issued at a low tax is apt to keep the general interest rate too low and prevent the inflow of gold. The advocates of asset currency in this country refuse to consent to the imposition of a tax which would cause their currency to disappear in ordinary times. Asset currency so taxed is not their kind of asset currency.

The question of the basis of the currency issues, whether bank assets or miscellaneous securities deposited with the government, is of minor importance as compared with the question of an adequate tax on the issues. Still, because of the number of banks

in the United States to be surveilled, it seems preferable that the government should have in its own hands something to secure the issues. Coming to the question of the character of the securities to be so deposited, we find objection made to the inclusion of railroad bonds on the ground that the market value of railroad bonds would be unduly enhanced. Is this objection sound? A high market price for the bonds means borrowing at a low rate of interest, or lighter fixed charges on the railroads. Now, whether it be the public purpose to further cheapen the service or to let the railroads earn a profit and insist upon their using it to better the service, a lessening of the burden of fixed charges conduces equally to either end. So that from whatever standpoint we look at it, the inclusion of railroad bonds in the securities to be deposited for emergency currency issues would be a public gain.

The crisis of 1907 was aggravated, as we know, by a run on the banks. Two devices suggest themselves as calculated to prevent a recurrence of this: one, postal savings banks, the advantages of which must be apparent to every student of public questions, the other a guarantee by the federal government of deposits in national banks. It would be a distinct gain if, while having a secure currency, we could at the same time make secure the deposits in national banks. This guarantee could be made without risk of financial loss to the government if a small tax were imposed on the banks the proceeds of which would constitute a guarantee fund, the government being empowered to levy an extra assessment on all the national banks in addition to the regular tax whenever the guarantee fund fell below a specified amount fixed by the statute. The contention that the government would assume an impossible obligation under such a guarantee is met by the provision that the government guarantee be limited to the actual fund collected, as under the Canadian provision for the redemption of the notes of failed banks. Is such a guarantee likely to undermine to any great extent the conservative management of the banks? Certainly it would not relieve the stockholder from responsibility. Before the government guarantee would apply and the government fund be touched, the stockholder would be called upon to make good his extra liability of \$100 on every share of stock when the assets were inadequate.

It may be urged that the power to withdraw deposits and make

the bank unprofitable, or actually to threaten its stability, is an instrument the effect of which is immediate, that therefore the depositor in practice exercises a much more effective control over the directors than the stockholder, whose knowledge of the affairs of the bank is notoriously inadequate and whose control of the bank's policy is correspondingly feeble; that the consciousness of this fact acts as a check upon the bank's officers; that if depositors were guaranteed the depositor would no longer scrutinize the management of the bank, the result being looser management and more failures and greater losses to be made good by a government guarantee. To what extent the watchfulness of the depositor makes for conservatism in banking is problematical. Let us assume that all of these contentions are well founded and that at first losses through bank failures would be doubled under this plan. On whom do these losses fall? Not on the depositor, for his deposit is secure under the government guarantee—and the depositor is the public. It falls, first, on the stockholder, who, if bank methods become lax, will soon devise means of keeping better control of the management. It falls, next, on the associated banks whose interest it immediately becomes to insist on more efficient government supervision. Furthermore, one source of bank failures—the run on banks—is removed. With these factors to offset the greater laxness of bank management, which we will assume results from the withdrawal of watchfulness on the part of depositors, it is reasonable to suppose that in the course of a few years the losses through failure of banks would not be greatly in excess of the present average. But even if these losses were doubled a very small tax would still suffice to cover them.

In the extreme case of losses threatening to become excessive, resort could always be had to a repeal of the statute and, after reasonable notice, an abandonment of the government guarantee without jeopardy to existing interests. In other words, the proposed legislation involves no such dangers as lax currency legislation.

Ease of mind of the depositor, actual security from loss on the part of many who can ill-afford a loss, a broadening of the practice of intrusting money to banks instead of hoarding, the entire removal of the incentive to withdraw deposits for hoarding and consequent doing away with runs on banks; these are the advantages that could be confidently expected.

In a discussion of the business depression and possible remedies the question of wages forces itself upon us. It is urged that the laborer should accept lower wages to help along recovery. In many cases he is forced to accept lower wages whether logic is with him or not. In times of business depression his strategic position is particularly weak and his appeal must be principally an appeal to reason. Now, from the standpoint of the public interest, to what extent does a reduction of wages really conduce to recovery, and even though it may so operate, is the public welfare promoted in the long run by such reduction? If the standard of living be lowered by lower wages—and how can it be otherwise—lowering wages is to be avoided, if possible. It is the standard of living which makes not only the market but the man, *i. e.*, makes him a more valuable citizen and more efficient workman. If wages are the last thing to recover with a recovery of business activity and the last thing to advance amid advancing prices, then wages are entitled to especial consideration and protection. Undoubtedly lowering wages helps to lower prices, but in times of depression the extent to which lower prices enlarge the market is problematical. If it be a question of foreign competition, *e. g.*, if lower wages abroad are forcing the manufacturer out of his principal field of operation, the case for lower wages at home is plain. But when a people are surrounded by a tariff wall, it is safe to say that in the long run wages are recovered by the employer in prices, just as taxes in the long run are recovered in prices.

And underlying the whole problem is the question of social justice. Has the laborer since the beginning of the industrial era gotten out of his labor as decent a living as the ingenious labor-saving machinery of modern times should give to him? And is it not fairer that capital and direction should suffer the pinch of hard times before they ask labor to share it?

NECESSITY AND PURPOSE OF ANTI-TRUST LEGISLATION

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The particular phase of the "Present Business Situation" to be considered in this paper is the effect upon business of anti-trust legislation. I do not mean anti-trust legislation in a radical sense, since the trusts have become a permanent and essential part of the business system of the country and legislation against them would be futile, but I mean legislation designed to regulate and measurably control them. The briefest consideration of this subject will be guided by the particular object of the legislation in view, because, in any case, business expediency must yield to the public welfare in its broader sense, and a temporary sacrifice is often necessary to insure a permanent benefit.

To begin with, I think it is mischievous to attribute to legislation the recent panic and the business depression which ensued. Such a theory deprives us of the only profit to be derived from the experience, and it diverts attention from conditions which require careful consideration. According to a Spanish proverb, "There is no evil that does not result in good," so the effects of the panic will not be all a loss unless by wrongly ascribing them we ignore the real cause and fail to take precautions against a recurrence. The fact is that prosperity was over-exploited, public credulity capitalized, and funds were diverted from legitimate employment. It is true that agitation favoring trust legislation, by calling attention to corporate abuses, hastened the day of reckoning, but if it had been deferred it would have been a day of calamity. Inasmuch as the reaction was inevitable, it is well it came when the inherent soundness of the situation saved us from disaster. The tide running flood for many years made a current so deep and strong that the channel-marks of safety were lost to view. They become visible

again as the tide recedes, and if heeded will protect us from worse conditions than those we have known. Prosperity, like good food, incurs the penalty of indigestion unless discretion tempers indulgence.

The legal use by many mere agencies of speculation of the term "Trust Company," a title heretofore associated with extreme conservatism, is an example of the lack of discretion observed and of the laxity of the law. Moreover, nearly all the trust companies in New York had adopted banking functions heedless of the clearing house demand for conformity to banking precautions. Thus, with over \$600,000,000 of deposits (a large proportion of them payable on demand), a number of these institutions had practically no reserve fund when the panic broke. This acute feature of the situation was not due to legislation but to the successful resistance to legislation that would have safeguarded it.

With the trusts as they have developed during an era of wonderful industrial progress, or at least with those of them that do not run counter to public policy, we have no quarrel. For better or for worse, they are established institutions, entitled to all the protection of the law which gave them existence. Their methods of formation, however, and their purposes and procedure, in so far as they do oppose public policy, require legislation to regulate and control them, and such legislation is not to be subordinated to its immediate or temporary effect. They have brought into business life a new set of conditions not contemplated by existing law, and in advance of legislation to govern them. Each of these mighty and impersonal agencies is founded upon the displacement of many independent proprietors and aims at further absorption and a complete monopoly of its products—with all the functions pertaining to it—from the first source of supply to final consumption. Their object is to pay dividends upon greatly inflated capital; they are unhampered by the ethical standards that pertain to personal relations and do not concern themselves with questions of public policy when in conflict with their own interests, while their vast resources are a bar to individual enterprise and to competition, which is the life of trade. Having acquired dominion in their respective spheres, absorption continues *inter se*, until, if unrestricted, a situation arises which is

a menace to the state. The life insurance disclosures have shown how concentrated wealth breeds a sense of power readily convinced of the superiority of its own interests—to be protected at all hazards. On the other hand, the trusts supply a requirement of modern business which in the enlarged scale of operations is beyond the efforts and resources of individuals and private firms, and it is this consideration that conciliates the natural sentiment against them.

The necessity for laws to govern these new conditions is not open to dispute, however opinion may differ as to what constitutes necessary legislation. The trusts on their part assisted by a corps of the highest legal talent, while asserting every privilege and immunity that the most favorable construction of the law affords them, resist new legislation affecting their interests except such as is specifically framed on their behalf. While public opinion does not countenance reprisal, it is small wonder that this practice of the trusts injures them in public esteem and at times results in hasty and unwise enactment. Such an enactment seldom does serious harm, because it cannot invade fundamental rights, and as a matter of fact it yields to an enlightened public opinion. In any case, no sort of legislation so harmfully affects business as do the methods employed by special interests to influence enactment and enforcement—while one is subject to correction the other paves the road to socialism or worse. In the main, legislators are responsive to public opinion and the law is justly administered. If this ceases to be the case, the remedy is not the money power, indeed, the money power and property itself may well look to their own stability.

Legislation itself, however, is seldom the cause of serious disturbance in business. Conditions readily adapt themselves to the accomplished fact, but agitation to secure legislation, and the uncertainty which attends it, alarm capital and clog the wheels of trade. If, for this reason, agitation is to be considered a malady, our first care should be to remove the cause. There is no disposition to hamper the legitimate functions of the trusts or to rank the observant among them with the delinquent,—at the present time, for example, they have the support of intelligent opinion in seeking an amendment to the antiquated Sherman Law in its unduly restrictive features. On the other hand, what voluntary deference

do the trusts show to the public will? They have resisted the enlargement of the power of the Interstate Commerce Commission as required to meet conditions arising; they demur to a proper control of public utilities; and they have opposed a revision of the tariff upon the plea that it would interrupt prosperity. The burden of adjusting conditions to a new schedule will now fall upon business when it has other cares to distract it, and the issue adds anxiety to the forthcoming election. If this obstructive attitude is continued on their part there can be no surrender or compromise on the other side, and the contest must go on—not in a vindictive spirit, however, but as our respected governor in New York upholds the constitution—steadily and persistently. Whatever may be the cost of such a struggle, or whatever its effect upon business conditions, victory will be cheap.

The mere statement of a few of the objects and effects of trust dominance is sufficient argument against them. The shipping and shipbuilding trusts, formed under the ægis of successful finance to exploit an expected grant from the public treasury, were a mockery of public intelligence in their ponderous capital. The tyranny of the tobacco trust in its methods of acquiring control is a matter of reproach. The scandals of the lighting and traction trusts throughout the country make pabulum for the demagogue. Are these conditions to continue for fear of the effect of corrective legislation upon business? Is there to be no supervision of the extent of authorized capital, or no requirement for the publicity of essential facts because Wall Street decries anything that disturbs values? Are food products to go uninspected because the exposure of the methods of the beef trust impaired its foreign trade, or must the great cities be content with the lighting and traction service they now get while franchises and the franchise-making power are corruptly manipulated? To put these propositions in the form of queries is an injustice to American readers. An answer comes from distant San Francisco, where the determined attitude of the citizens' committee excites our admiration. Against a press which laments the effect upon business, and society which frowns at the implication of its members, these resolute men insist that trust officials who make chattels of public servants shall be adequately punished, and that high station is but an aggravation of their offence.

In the administration of the trusts there are also features of sufficient importance to require legislative provision. Not to expand these statements beyond the space allowed, I will mention but one, which I believe is more prolific of trouble than any other. I allude to complacent directors, with the fullest faith that in point of intelligence and integrity the average American business man is the peer of his fellow in other communities. In the category of business men I do not, of course, include the gilded youth who points with pride to his selection of a father, nor the man of broader knowledge and experience whose vanity craves a score of directorates to the neglect of all, but the men who have made a success of their own affairs and who recognize the obligations incurred by a director. Such men, it is true, have little time to give to the affairs of corporations, but often when available they are "not serviceable" because of a propensity to discover and expose the schemes of an inner circle. The long lists of directors of many large fiduciary institutions, judged by their record of attendance and measured by their knowledge of the affairs that they direct, do not inspire confidence but explain the melancholy midnight processions in New York during the trying days of the panic. Men of unblemished personal record passed sleepless nights in saving from the effect of their neglect several prominent institutions. If this was the only damage done it could be complacently regarded, but the consequence was to prolong the turmoil, and the community is justified in expecting legislation to substitute the practical for the picturesque.

It is incredible that the reputable men who were directors of the delinquent trust companies in New York were cognizant of the conditions which led to their troubles, or that their judgment had due weight in the councils that resisted the dictates of prudence. The Constitution of California makes broad provision for the accountability of directors and trustees alike. This provision was objected to at the time of its adoption, on the score that men of means would not serve as directors, but the event has proved otherwise. It is not to the point that business procedure requires the delegation of power and authority to executive officials, because the same necessity applies to private firms, and directors are properly holden to the measure of care and

supervision exercised by a merchant, and the community is entitled to such assurance.

"The people who are governed least are governed best" is equally true of corporations, without prejudice to the necessity for legislation to fix their status and regulate their procedure. Shorter sessions of Congress and state legislatures are devoutly to be wished, and the trusts can contribute to this end by realizing the futility of opposition to measures vital to the public interest. If those in control would recognize a trust in the broader sense and render to Cæsar only his due, make public policy a part of their consideration, and conduct the affairs in their charge in the same way that made their earlier careers a success we would hear less of anti-trust legislation and its effect on business. On the contrary, reciprocal relations, if established, would disarm captious criticism and vanquish an antagonistic sentiment that the trusts have done much to provoke.

It is not my purpose to paint a picture of gloom or of despondency. There is no occasion for gloom and no room for despondency in this land of hope and plenty. Perpetual sunshine is neither to be expected nor desired. The business man awakened to his opportunity and responsibility is equal to the problems he has to solve. It first behooves the financiers, however, to come back to their moorings. They have departed from the time-honored conservatism of their guild to dangle the bait of "get-rich-quick" methods. The great corporations which they have launched are a pride only in the success they attain. Their prosperity can be no greater than the prosperity of the country at large, that is the prosperity of the individual, without whose restored confidence the occupation of the magnate of finance is gone.

THE DRUG TRADE AND THE ANTI-TRUST LAW¹

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Thirty years ago the wholesale drug trade of the United States, was in a demoralized condition. Competition was fierce, especially in proprietary medicines, which constitute more than half of the average drug jobber's business. There was little or no profit on these goods, and with many wholesale druggists it was a severe struggle for mere existence. The situation became so acute that it was absolutely necessary to find a remedy, and about that time the wholesale druggists of the country, all suffering from the disastrous results of excessive competition in proprietary medicines, formed their association. Upon the petition of the association many proprietors of these goods adopted the so-called "rebate plan" in the mutual interest of the jobbers and themselves. Under this plan the proprietor fixed a uniform wholesale price for his goods all over the country, and paid the jobber a rebate therefrom, upon the condition that the latter would not sell below the price; the matter being covered by a contract or agreement between the proprietor and each of his wholesale distributors. This rebate or discount constituted the jobber's entire compensation for handling the proprietor's goods, and the allowance was only a reasonable one, being but little more than the cost of transacting the wholesale drug business. The jobber was thereby insured a steady, although small, profit on proprietary articles, and the cut-throat competition which formerly prevailed in the wholesale drug trade on this class of goods was greatly reduced. The present margin of profit on the wholesale drug business is not to exceed three per cent on the total amount of sales, which is a very moderate return, considering the large capital invested and the technic knowledge required to conduct the business.

¹ A large part of this paper has previously appeared in the Proceedings of the National Conference on Trusts and Combinations under the Auspices of the National Civic Federation, Chicago, October 22-25, 1907.

Organization in the Drug Trade

While the rebate plan provided a reasonable remuneration for the jobber, it gave no protection to the large army of retail druggists who some years later were compelled to sell proprietary medicines practically at cost, to meet the ruinous competition of department stores and the few large retailers who made a specialty of cutting prices on these articles, mainly for the purpose of drawing customers to their stores and selling them other goods on which they made a large profit. In order to assist the rank and file of the retail drug trade, many proprietors adopted, about seven years ago, what was known as the "tripartite plan," under which they required their wholesale distributors to refuse sales of their goods to "aggressive cutters," who insisted upon selling below the prices agreed upon by most of the retailers in their respective communities.

The "direct contract and serial numbering plan" was later adopted by some of the proprietors, who fixed both the retail and wholesale prices on their goods, and took direct contracts from the retailers as well as the wholesalers, requiring them not to sell below such prices.

Under none of these plans were the prices of proprietary medicines unreasonably increased. They were never advanced beyond the retail prices marked on the goods by the proprietors themselves and in fact, the retailers sold considerably below such prices in the great majority of cases.

Violation of the Sherman Anti-Trust Law

Unfortunately, however, some mistakes occurred in the operation of the "tripartite plan," the principal one being the effort of the retailers, through a so-called "honor roll," to persuade jobbers to refuse goods of every kind to "aggressive cutters." This led to excesses which occasionally took on the appearance of an attempt at tyranny, and the result was that the government brought a suit against the proprietors, wholesalers and retailers, on a charge of combination or conspiracy to restrain trade in violation of the Sherman anti-trust law. As the outcome of this suit, the United States Circuit Court, at Indianapolis, issued a decree forbidding any

further co-operation between the three branches of the trade in carrying out any plans for the sale of goods, and even enjoining the wholesalers and retailers, through their respective associations, from making any effort to secure the adoption by proprietors of plans for the maintenance of their prices. But the decree does not deny the right of a manufacturer to adopt and enforce any plan he may choose for the sale of his own goods, provided his action is individual and not in combination with any other person or association.

While some errors were made in the attempt to improve the deplorable conditions existing in the retail drug trade, they were due to an excess of zeal and there was no intention on the part of any one concerned to violate the law. It was a great injustice to designate as a "drug trust" the trade arrangements which existed among the manufacturers, wholesalers and retailers for the sale of proprietary articles. On the contrary, these arrangements were directly opposed to the "trust" idea. Their object was simply to establish uniform selling prices which provided only a fair margin of profit, so that the thousands of small dealers could continue in business, instead of being driven out by the comparatively few "aggressive cutters," whose methods tended to monopolize the business in their own hands.

Until the government suit was brought against the drug interests it had always been supposed that the Sherman anti-trust law was intended for the protection of the many against the few. It was used, however, to produce exactly the opposite result in this case. It was also humiliating that the whole drug trade of the United States should be branded as conspirators and lawbreakers because they were parties to trade arrangements which had always been considered proper until the Sherman law was invoked. It has been truly said that it is not possible to indict a whole nation, but now our own government has enjoined a whole trade, because the number of druggists who had not signed the contracts was so small as to be practically negligible.

The Sherman law is such a broad one that the injunction in the government suit completely tied the hands of the two large associations existing in the wholesale and retail branches of the drug trade, and prevents either of them from making any organized effort to obtain protection from the manufacturers whose goods they handle. It can hardly be conceived that the law was ever

intended to work such a great hardship upon thousands of good citizens engaged in the same line of business. Unless this law is so amended as to permit reasonable agreements which are beneficial to commerce, and which do not conflict with the public welfare in any way, the business men of this country will undoubtedly be placed at a great disadvantage. If this law should be literally applied, it will cause the greatest possible restraint of trade, although it was intended to prevent that condition. Reasonable agreements do not restrain trade, but promote it.

Possible Scope of the Sherman Act

Should the Sherman law be pushed to its logical conclusion, the merchants and manufacturers, who are being held to a strict accountability under it, are not the only class of citizens whom it will involve. For instance, it is well known that the farmers, through their associations, fix the price of cotton, and perhaps other commodities produced by them. According to the newspapers, such associations have not only established minimum selling prices on cotton, but have arranged for storing and holding the crops until purchasers are compelled to buy at the prices fixed by them. Labor unions have also been actively engaged for many years in making agreements with their employers, fixing the price of labor, regulating the hours of work, etc. It is hardly necessary to refer to the many strikes and boycotts which have been inflicted upon the country, often with serious results to the public interest, as they are matters of common knowledge. Once the toiling and voting masses of the nation realize that their own interests are threatened by the Sherman law, it is easy to conceive that our national legislators will no longer fail to appreciate the necessity of correcting its defects.

European Law on Merchants' and Manufacturers' Associations

In striking contrast to the restrictions imposed by the Sherman law in our country, it is enlightening to observe what absolute freedom of trade is permitted by the governments of other countries, notably England, France and Germany, which place practically no legal restrictions upon agreements regulating the prices and sale of goods. Through the courtesy of the Department of State at Washington, a series of questions, prepared by me, were

answered by the American consuls in more than fifty of the principal cities in the three countries named. These consular reports show that Great Britain, France and Germany have never undertaken to prevent or interfere with proper trade agreements. On the contrary, the widest latitude seems to be allowed manufacturers and dealers, among whom numerous combinations exist, especially in England and Germany, to secure the maintenance of prices and terms.

In our own country, however, the Sherman anti-trust law is so sweeping that it makes illegal every contract or combination in restraint of trade. Even if the contract or agreement is a reasonable one and does not menace the public welfare in any way, it is nevertheless prohibited by this law.

As a matter of curiosity, it is interesting to refer to a "Catalogue of Drugs, Medicines and Chemicals sold wholesale and retail by Jacob Schieffelin, 193 Pearl Street, New York," published more than one hundred years ago. This old price list was printed in 1804, and it bears the following official endorsement: Examined and approved by the New York Druggists' Association, New York, August 6th, 1806. By order, Henry H. Schieffelin, Secretary." It would seem that it was entirely lawful in those early days for merchants to form an association and agree upon the prices to be charged by its members.

There is a pressing need of congressional legislation which will make it lawful to enter into reasonable and proper trade agreements, for without such agreements it is difficult to meet the complex conditions of modern business. The Sherman anti-trust act was no sudden legislation, as it was introduced nearly two years before it was passed and was the subject of exhaustive discussion. Yet Senator Sherman said his act was a law in "general terms" to be modified by subsequent legislation.

It is generally believed that the fixing of insurance rates by agreement of the underwriters is an advantage to the public, nor have I heard much criticism of the action of the Clearing House Association in fixing the fee to be charged for collecting out-of-town checks, and imposing a penalty for a violation of the terms; yet mercantile agreements are analogous. Merchants should be allowed to attach to any purchase or sale any conditions that are not contrary to public policy.

Unjustifiable conditions or agreements are those which tend to control the markets for speculative purposes, or to create a monopoly and eliminate legitimate competition, so that merchandise could be sold at extortionate prices, but justifiable agreements are those which tend to protect from a ruinous fluctuation of prices owing to a needless competition. Therefore the law should be amended to legalize agreements in justifiable restraint of interstate trade which have a reasonable or laudable purpose, and which are filed with the Department of Commerce. Publicity would thus be secured and any question as to whether the agreement was justifiable could be tried in the federal courts.

ATTITUDE OF LABOR TOWARDS GOVERNMENT REGULATION OF INDUSTRY¹

BY SAMUEL GOMPERS,
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In his paper upon The Causes of the Present Business Situation, Mr. Isidor Straus stated that if fifty business men were to go separately before some just judge, and each give his version or judgment as to the cause of the present business situation, it would be exceedingly difficult, if not impossible, for the judge to decide intelligently the real cause. I am in entire accord with Mr. Straus, but I want to draw just one inference from that statement, and that is, that I believe the fifty business men and all others, including this splendid audience, will agree that, whoever is to blame for the present industrial and financial crisis and stagnation, it is not due to the fault of the working people of this country.

We all agree that this is one of the most fertile countries on the face of the globe. Nature is kind to us. Our natural situation is splendid. With eighty-five millions of souls in our country, with our enterprise, ingenuity, industry, and with our men working and producing the wealth of our nation, bent upon producing more wealth, giving the very best that is in them, the country awoke one fine morning last October to find that the industries were checked and many of them stopped, and that many men were thrown upon the streets without the opportunity to continue to produce wealth, so necessary to the welfare of themselves and all the people. It is a lamentable criticism upon the acumen of our princes of finance and of our captains of industry.

Of one thing I am sure no one can justly accuse the men of labor, and that is that they are pessimistic. Well, I should perhaps make a distinction between the men of labor who have not succeeded in arriving at the conclusion that their best interests are protected and promoted by association with their fellow-workmen, and those ready to help each other to bear each other's burdens, and willing to assist and receive the mutual benefits and advantages that come from associated effort. Speaking for them, the

¹An address delivered at the Annual Meeting of the Academy, April 10, 1908.

organized, the associated workmen, I am sure that they have not lost faith. They are optimistic. They have faith in themselves and in each other. They have faith in all the people of this country. They have faith in the institutions of our country, and they are determined to see that the principles and purposes underlying this republic shall be perpetuated for time without end.

It is one of my duties to endeavor to ascertain the state of employment, or, rather, the extent of unemployment. From the most accurate data I have been able to collect and collate, I find that in January, 1907, among the associated, the organized, workmen, there were about three per cent who were unemployed. In January, 1908, there were eight per cent unemployed. In February, 1907, there were about two per cent unemployed; in February, 1908, nine per cent, and I should say that, in my judgment, this is rather understated.

No matter how much people may differ as to the organizations of the working people, I think it is generally admitted that the most skilled, the most intelligent of the working people, are in the labor unions of our country, and with the labor bureaus that prevail among them, there is a larger percentage of workmen in the organizations of labor who are employed, than among those who are not so associated.

I make this statement to correct the exaggerated statements of both sides. I have seen it variously estimated that there are five millions workmen unemployed, and on the other hand I have heard it asserted that there are not half a million. I am sure that the figures which I have presented to you are as nearly accurate as are obtainable from any source.

I desire to speak of another feature of this general discussion, the government regulation or control of corporations, associations and combinations. At the outset let me say, as one entitled to speak in a measure for workmen, and having their mandate, that we are not in favor of that species of governmental action that shall deny the right to the business man of our country to conduct modern business within the law. We do not believe it is right, just or wise that the assumption shall be set up without good proof that the business man is conducting his business unlawfully, and this I think will suffice for me on this phase of the subject, for I take it that the business men have sufficient men and brains to

present their own cause. I shall speak particularly for the cause of the men and women who toil, and who have too few to speak for them.

The Sherman anti-trust law assumed that all combinations, and that all persons who associated themselves for the purpose of advancing their own interests, and who might thereby in a measure restrain trade, were guilty of an injurious restraint of trade. Whether that restraint was beneficial or not, whether or not it was advantageous and performing a great public service, it was illegal, was unlawful and punishable by fine and imprisonment.

I have already said that it is not necessary that I shall present the viewpoint of the business man, but I want to present to your consideration this fact. Is there any man or woman here this afternoon, who, in the year 1888 or 1890, dreamed, suspected or imagined, when that legislation to regulate trusts was under consideration, that the organizations of men and women who work were included under its provisions? Having lived at that period, and having had some close, intimate relations with the men who were responsible for that legislation, and having had conferences with them at the time, having known their expressions as borne out by their official utterances in Congress and printed in the Congressional Record, I am certain there was not one who, even by indirection, declared that this legislation covered the organizations of farmers, horticulturists, or wage earners.

The Supreme Court of the United States has declared in a recent decision that the labor organizations do come under the provisions of the Sherman anti-trust law. I shall neither here nor elsewhere undertake to criticise disrespectfully a decision rendered by that great and august judicial body of our country, but I think that we have the right, as men and women, to differ from an opinion rendered even by the Supreme Court of the United States.

The Supreme Court of the United States has sometimes reversed itself. Perhaps I need only to refer to the fact that when the income tax law, passed by Congress subsequent to the war with Spain, was before the court, the court decided by a vote of five to four that the law was constitutional, and then, six weeks after, the same court, composed of the same men, voted by five to four that the law was unconstitutional. There are other cases to which it is not necessary now to refer. If any man desires to

take exception to any differences of opinion with the Supreme Court, I advise that he read the dissenting opinions of the judges of the Supreme Court. No severer arraignment has ever been indulged in by any citizen of our country.

Many have fallen into the common error of speaking of workmen and workingwomen as labor, and then making the general statement that there should be equality of treatment of labor and capital, or capital and labor. The error is this. Capital is chiefly inanimate, things without life. Capital is the product of human effort. It is the product of the laborers, while the wage earner—labor—is part of the human living, breathing man and woman. You cannot differentiate, you cannot distinguish, between labor and the man and the woman who perform the labor, and it is economically and scientifically unsound for anyone to confuse the terms of capital and labor. Capital, I want to emphasize, is the product of the laborer. Labor is part of the laborer himself. You can transport capital from one end of the country to the other. You cannot transport labor without transporting the human being, and the association of men and women who labor is for the protection of individual liberty, of human life, of human rights, the ownership and disposition of one's self. How even legislators or courts can fall into the common error is explained only by the confusion of terminology upon the subject.

There are some who would, by law, curb or turn back the wheels of industry and prevent the development of the concept of human rights. Let me say, my friends, that law, as I understand the term, is made for the government of the people and for their protection and the promotion of their rights, their liberties and their happiness. A law which has not that for its purpose and effect, fails to perform its proper function and must be either amended or ended.

Industry and commerce, and the means of transportation of the products of labor and the transmission of information, and labor using it in its accepted sense, cannot be turned back to the condition of a half century or more ago. Association is the very essence of our modern existence and progress. We cannot conduct our business affairs upon the old lines of each employer conducting an individual business. The old-time partnerships are very scarce. Companies are merged into corporations, and, if

you please, into trusts. They are not going to dissolve. There is no law; there is no power in government to dissolve the associations of the toilers or of industry; you cannot go back to primitive industrial conditions, and the law will either be amended, or ended, or not enforced.

On the other hand, the organizations of the working people have done much to instil manhood and character in the workers; and have given them a consciousness of self-reliance and self-respect. The organization has given them a recognition of the principle that man cannot live for himself alone, that he is accountable to his brother and for his brother, that he must be willing to help bear his brother's burdens. In doing this the organizations of labor have done much to shed a ray of sunshine where gloom obtained in the home before, and have raised the American standard of life of the working people of our country. They have shortened the hours of labor, and have given the workingmen and women time and opportunity for the cultivation of the best that is in them. They have raised in the workingmen a conception of the higher ideals of American institutions, and have made of the working people a yeomanry of which we should all of us be proud, a yeomanry which shall stand as the bulwark of the constitution of our country; and of the Declaration of Independence, even against the antagonism or apathy of too many of our people, who regard the Declaration of Independence as a string of glittering generalities.

Only a few days ago we heard that a decision was rendered by the highest court of Massachusetts declaring that a strike for a certain reason was unlawful; that a strike against the open shop is unlawful. Now no man, who has given the subject of labor any consideration for any considerable time, is an advocate of strikes. I am sure I have yet to make the acquaintance of any man, active for any considerable period in the labor movement, who has not done his level best to discourage and prevent strikes, but there comes a time in many industries, when, if the workingmen would not strike or prepare to strike, the chains of slavery and demoralization would be riveted upon them for all time to come. We do not advocate strikes. We do not denounce them. We know that denunciation of strikes does not stop strikes. It is the strike or the fear of a strike that compels fair consideration by the unwilling, unfair employers.

Let me say a word in regard to this so-called "open shop," for there is a misunderstanding in regard to it. The union shop carries with it the responsibility of an agreement with employers to fulfil and carry out an agreement. In many industries there are extra-hazardous conditions to life and health and limb. The courts have decided in several states that neither workingmen, nor their families, can recover damage in the event of injury or death by reason of the negligence or ignorance of co-employees. I ask you, my friends, whether, if that be the state and the practice of the law, workingmen are not justified in insisting that their co-employees shall possess a certain amount of skill, a certain degree of sobriety, responsibility and respect? Are they not justified in setting up a standard by which they themselves can protect their health, their limbs and their lives? The highest court in the State of New York held that that principle was not only good in law, but justified by modern industrial conditions.

It is now said that the boycott has been outlawed by the action of the Supreme Court of the United States. I shall not attempt to discuss that at length, but may I call your attention to the fact that China is now making a very serious attempt to boycott Japan, and it is not uninteresting to know that the newspapers advise us that no less a personage than President Roosevelt, together with Secretary Root and other officers of the legislative branches of our federal government, have very seriously considered how we can boycott Venezuela and bring that little country to terms.

This labor question is rather a large one, inasmuch as it encompasses the field of human endeavor, but let me say this, that we are rather chagrined, to put it mildly, to find that our courts have no hesitancy in guaranteeing us the "right" to be maimed and killed without liability to the employer, and the "right" to be discharged for belonging to a union, and the "right" to work as many hours as employers please, and as employers impose. They give us academic rights and deny us rights which are necessary to our existence.

It is contended by the laboring men that the power of the courts, particularly the equity power and jurisdiction, and the discretionary government by the judiciary for well-defined purposes granted to the courts, and within specific limitations, by the constitution, has been so extended that it is invading the field of government by law and en-

dangering individual liberty. I call your attention to this fact, that as government by equity—personal government—advances, republican government—government by law—recedes. It is against this tendency that the organizations of labor are now working. This is not generally understood. The results are not confined to the workers, and I speak of the workers in the generally accepted sense. Every successful contest which the working people of our country may make to secure human liberty, makes for the freedom of all the people now and hereafter.

THE POLITICAL SIGNIFICANCE OF RECENT ECONOMIC THEORIES

BY SIMON N. PATTEN, PH.D.,

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An American economics is a new creation, so new, in fact, that we scarcely realize its existence. I say this not because there is in the best of American work a break with the traditions of European schools, but because the underlying premises of economic thought are brought in America into clearer light and thus both their defects and strength become visible. Progress can be made by radical breaks with the past; it can also be made by bringing into sharper contrast ideas and premises which in the earlier thought were blended into a seemingly harmonious whole, but which, after all, represented opposing modes of thought. Economists can create systems, but it is only the trend of events that decides between them. Each generation compromises oppositions or holds tenaciously to opposing systems so long as there is nothing in envioning conditions that forces the isolation of two differing but temporarily harmonized principles. The recent changes in economics have been of this kind.

American conditions have developed latent oppositions that by earlier writers were smoothed over because nothing vital turned on them. The progress in American economics has set aside these compromises and built a more logical scheme of thought on fewer premises better interpreted and more logically stated. There are thus two diverging schools arising from a different emphasis of elementary principles, each with a body of theory and a program of action. Their contrasts would be of little moment if there were not also a steady shifting of public interest in directions that make the differences in economic theories correspond to differences in public policies advocated by publicists and statesmen. The road of the economist becomes the road of the people and the differences of economists are settled, not by their logic, but by the success or failure of the policy which each theory calls for.

It is in this spirit that I approach the problem of distribution which I shall try so to restate as to show its bearings on public

questions. To do this calls for a bit of history, for the two theories now contending for supremacy are stated by Adam Smith and expounded by later writers. They were compromised, however, both by Smith and his followers, so that economics seems at once on both sides of what is in reality a fundamental contrast. It is to the credit of American economists that this compromise is broken down. Much of this work has been done by Professor Clark, who has taken one element of economic thought and expanded it into a system the merit of which is superior to any that has preceded it. His premises are clear, his thought is logical and his conclusions as to public policy are equally definite. His theory of distribution is called a productivity theory, because he assumes that each share in distribution is fixed by its contribution to the production of income. What a capitalist gets, what a laborer gets or what a landlord gets depends on the productivity of each of these factors in distribution. All income is related to its service in production and its distribution is but a corollary to the laws of production. There is thus a natural justice, giving to each his share and preventing any one else from despoiling him of his just reward. This natural reward is the cost price needed to evoke the effort of production. Professor Clark thinks prices tend to this cost level, and when they do reach it the return of each producer is on a just basis.

It is plain that so simple an analysis of industrial conditions has elements of great popularity. It appeals to long-standing sentiments and to many popular instincts. But before accepting it we should see what can be said by those who oppose it and why an increasing number of economists find its premises and conclusions unsatisfactory. To do this we must contrast the productivity theory of distribution with a price theory which assumes that distribution is effected solely by price movements. In this way the elements in price become the factors in distribution instead of the agents in production, as Professor Clark assumes. Each share in distribution grows or falls off as it becomes a larger or smaller element in the price of commodities. Changes in price levels result not in a general loss or gain to all producers, but in a loss to some and a gain to others. If seven pounds of steel have been exchanged for a bushel of wheat and the ratio is so changed that six pounds of steel will buy a bushel of wheat, all farmers lose and steel makers gain;

while when eight pounds of steel must be given for a bushel of wheat, steel makers lose and farmers gain. If this be true, there is no general fall of prices following improvements in production. The gains in production constantly remain as price elements and are distributed by price changes. Values are thus put at a higher level than costs by improvements lowering the expenses of production. The difference between total values and total costs is the social surplus for which each group of producers contends. The successful in this endeavor become monopolists and get a larger share than do their less successful competitors. Monopoly is thus a natural phenomenon due to the growth of the social surplus. Its form may be changed, but it is always present and is of ever increasing importance as the productive power of men grows and their surplus is augmented.

Out of this fact arises the dilemma of modern economic thought. We instinctively feel that we ought to have a surplus over the cost of work and we also instinctively feel that others ought to work for cost prices. When we become producers we ask, "What will be the gain in this or that act of production?" thereby admitting that values are higher than costs and that each man's motive in production is the acquisition of some part of the surplus. Everyone would admit this and see nothing wrong in it, but when these same acts are passed in review as parts of public policy a standard of cost production is set up and the claim is made that cost prices are just prices. Either we are wrong as individuals to demand a gain in each act of production or we are wrong in asking that other people work for cost.

We remove this difficulty when we assume that the share of each claimant is fixed by the relative increase of his products. Years ago I stated the resulting theory of distribution as follows:

Of the factors necessary for production, that factor which tends to increase at the slowest rate will reduce the shares of the other factors to their lowest limits, will have the benefit of all improvements and must bear all permanent burdens.

This law is merely a corollary of the law of supply and demand. Given different rates of increase of products some must go down in price until their lowest limit is reached, while others will

rise until all the free surplus is absorbed. Falling prices are due to consumers' choices, and the more nearly complete this power of choice the more must competing producers lower their prices to get a market for their goods. High prices persist where no substitutes are at hand; low prices prevail where consumers' wants can be supplied in many ways. The slowly increasing factors in distribution are therefore in the fields where the power of substitution is poorly developed, while rapidly increasing factors correspond to the fields where the power of substitution is so nearly complete that low prices dominate. Factors in distribution thus fall into two classes: growing factors where the power of substitution fails, and the limited or losing factors where this power prevails.

It should be remembered that by a growing factor is meant one that is becoming a larger element in the price of commodities. In a progressive society all factors probably get more if we measure their total receipts, but many of them may at the same time be a smaller element in price and thus have reduced relative share even when the amount of their share is greater than before. The rent of a city lot, for example, may rise from \$1,000 to \$5,000 a year, and yet if ten times the amount of goods is produced on the lot this rent will be a smaller part of the price of each article produced. Rent may thus be a smaller part of the total value of goods, although its total amount is greater. By growing shares are meant only those which grow both in amount and in relative importance. These growing factors are at the same time the most slowly increasing factors, for the less the rate of increase of the product is, the more rapid is the growth of the share as an element in price. They gain what the power of substitution takes from other factors who have definite claims that must be allowed, but who cannot expand them so as to get a share in the social surplus created by improvement. Growing shares are thus residual claimants who absorb all the benefits of progress.

There are thus a number of limited claims due to the fact that certain shares are subject to definite laws, and there is a residual claimant that gets what is left because other factors fail to secure it. There are also factors whose shares are falling because the power of substitution is cutting down the price at which their products are sold; and there is a growing factor which gains what the pressure of competition takes from its rivals. With the aid of

these contrasts the place of the various factors in distribution becomes evident. The residual claimant is monopoly, the growing share is wages, while the shares that are limited and tending to fall in amount as society progresses are rent, profits, interest and risk. Where the power of substitution acts against the growth of a share the only problem is: What resists a fall in prices which if effected would wipe out the share? Definite laws of rent, profits and interest have been formulated which show what the lower limits of each share is. None of these limited shares can claim a larger amount of the gross product of industry than it now receives, and against them the power of substitution will act with increasing force. These shares can therefore be said to fall off with progress and in an ideal state of society to disappear if we assume that in such a society the power of substitution is complete and the environmental conditions of men are improved to their maximum.

The growing shares as we find them to-day are plainly monopoly and wages. There is, however, this difference between them: Wages at any one moment is fixed like the other limited shares. It is not, as President Walker taught, a residual claimant. And yet it is a growing claimant which secures in the end what the other shares lose. The more productive land is, the lower will be rent; the greater the ingenuity of inventors and industrial managers, the less enduring will be their reward, and the larger the productive power of capital the less will be the rate of interest. This is because the power of substitution cuts down the return of all effective agents except labor. Through the increase of their mobility the laborers substitute better opportunities of labor for the poorer ones they formerly utilized; they go from poorer land to the better land, from worn-out regions to those with increasing fertility, from mechanical occupations to those demanding skill and efficiency. They thus move from the margin of production that yields small returns to points of higher productivity, and by wiping out the old margin set a new standard for wages and force the public to pay them. The increase of wages is measured by the laborers' mobility, and wages will be a growing share in distribution so long as this agent is active in forcing new adjustments of population and in creating a wider spread of the knowledge that makes production efficient.

The laborers' advantage, however, does not end here. Another

potent force in raising wages is the socialization of the laborers taking place in every industrial group. The differentiation of industry throws into the various industrial groups men of similar character, education and ability. Like qualities and common interests create group feeling and generate a consciousness of kind which makes socialization possible. Groups thus formed ceasing to act as individuals must be dealt with as units. They will not compete with one another for places, nor undersell each other on the market. We have thousands of industrial groups of various kinds—high and low—so fully socialized that their joint action limits individual competition and gives a monopoly power to their members. This socializing tendency is not a disappearing force, but one that is growing so rapidly that it will soon be a dominant element in industry. When this time comes, or to the degree that it comes, the influence of marginal production on prices will cease. The competition that lowers prices is that of individuals within industrial groups. Marginal production assumes individual action on the part of each producer and individual interests that stand opposed to other producers. Should this competition cease the marginal man will no longer fix prices. Each group of producers will offer its joint product as before and the law of substitution will fix its value; but there will be no test of individual productivity by which the price of labor can be forced down. The growth of wages would be limited only by the productivity of industry.

Keeping in mind the increasing mobility of laborers and the growing socialization of industrial groups, it is evident that wages will steadily rise and that a rising standard of life will permanently keep intact the gains of each generation. Wants grow faster than productive power, creating an irresistible pressure that no other force can withstand. The power of monopoly, on the contrary, is temporary; each particular monopoly gains the ascendancy at the expense of some other monopoly. The losses from new monopolies never fall on the public,—they are borne by those who have lost the old powers that gave them a monopoly force. Monopoly temporarily increases with every improvement in production, but these gains soon fall away unless they are reinforced by those coming from the new improvements of industrial processes. Rapid progress means much monopoly; slow progress means its decay, and static conditions would lead to its disappearance. That industrial mo-

nopoly is more frequent and powerful than a century ago is the cost of rapid progress. Monopoly is the index of change and a sign of an increasing social surplus. It means no perversion of industrial forces, and is as natural a result as are any of the other phenomena of distribution.

Such is in outline the price theory of distribution with its corollary that industrial monopoly is a natural result of price movements. Is it correct, or is Professor Clark right in asserting that monopoly is "a general perverter of the industrial system"? The answer to this question constitutes the essential difference between the two theories of distribution that I have presented. Both theories also have definite consequences which have been clearly stated in recent discussions. Professor Clark's "Essentials of Economic Theory" gives a clear program that logically follows from the acceptance of the productivity theory and its corollary that cost prices are just prices. In my "New Basis of Civilization" I have outlined a program that seems to follow just as logically from the acceptance of the price theory of distribution.

The essence of Professor Clark's position is the belief that cost prices are just prices. Producers should get a fair return on their capital and no more. This doctrine is the basis of economic theories so well established that it has become a part of the popular consciousness. The difference in Professor Clark's view and that of earlier writers consists in the fact that he regards monopoly as an evil so powerful that if not destroyed the régime of natural prices will cease. Earlier writers believed that economic motives active in individuals would suffice to keep prices on a cost basis. He demands a regulation of monopolies. "It is perfectly safe to assert," he tells us, "that only by new and untried modes of asserting the sovereignty of the state can industry hereafter be in any sense natural, rewarding labor as it should, insuring progress, and holding before the eyes of all classes the prospect of a bright and assured future."¹ "Monopoly is not a mere bit of friction which interferes with the perfect working of economic laws. It is a definite perversion of the laws themselves. It is one thing to obstruct a force and another to supplant it and introduce a different one; and this is what monopoly would do. We have inquired whether it is necessary to let monopoly have its way, and have been able to

¹*Essentials of Economics*, p. 379.

answer the question with a decided *No*. It grows up in consequence of certain practices which an efficient government can stop."²

No one who accepts Professor Clark's principles can dissent from his conclusion. Monopoly will not disappear by any force that individuals can put in action. If the tendency of prices to rise above the cost level is wrong, he is a bad citizen who benefits by the higher range of prices. The control of prices thus becomes the first duty of the state to which its older function of securing justice and fair dealings becomes subordinate. In these views Professor Clark does not stand alone. He represents the great mass of American citizens whose spokesman is President Roosevelt. For the ideas of our President no better background can be found than the economic doctrines of Professor Clark, who has developed the side of economics on which popular beliefs rest into a simple, forceful system which gives a program for action demanded by the feelings and interests of the people. The public is fully convinced that just prices are cost prices and that government should increase its functions and become a regulator of prices.

The public, Professor Clark and the President are also agreed as to the fields where the cost prices are to be introduced. Railroad rates and the tariff are to be modified so that the cost of production shall fix prices. This means a physical valuation of railroads and a similar estimate of the costs which manufacturers must undergo in the United States. There seems to be a ready means of doing this by setting aside the watered stocks of railroads and the lowering of the tariff to a point where monopoly advantage ceases. But the lines between these fields are not so sharp as the President and Professor Clark suppose. Watered stock is a definite sum and in a single field, but watered costs is a general phenomenon. Every one thinks he earns what he gets, but he keeps his accounts in such a way that he exaggerates his costs until they seem equal to his income. As he views it, he has no unearned income similar to the watered stocks of railroads or the high prices of protected industries. But were the principle of physical valuation introduced and the functions of government so extended that it became the controller of prices, his costs would not be estimated by himself, but by others who would have the same interest in reducing them that he now has to do this for the railroads and protected indus-

²*Essentials of Economics*, p. 559.

tries. And we are not without those who demand an extension of the doctrine of physical valuation beyond the point set by Professor Clark and the President. The single tax doctrine applied to land has the same thought as has the physical valuation of railroads. The farmer thinks that land values depend on real costs, and the city land speculator has the same opinion as to town lots; but a public valuation of this property would cause the watered costs of the farms and city property to shrink to a lower point than would the values of railroads.

Professor Clark has a skilful way of hiding land values by subserving them under the general concept of capital, but if the doctrine of physical valuation is once introduced the public will soon be educated to the evils of watered land values, and the same demand will arise for its physical valuation. If the doctrine is correct and the fixing of prices is a duty of the state, the principle will gradually have its application extended until every kind of property is brought under governmental regulation, and no watering of stock or of costs will be allowed.

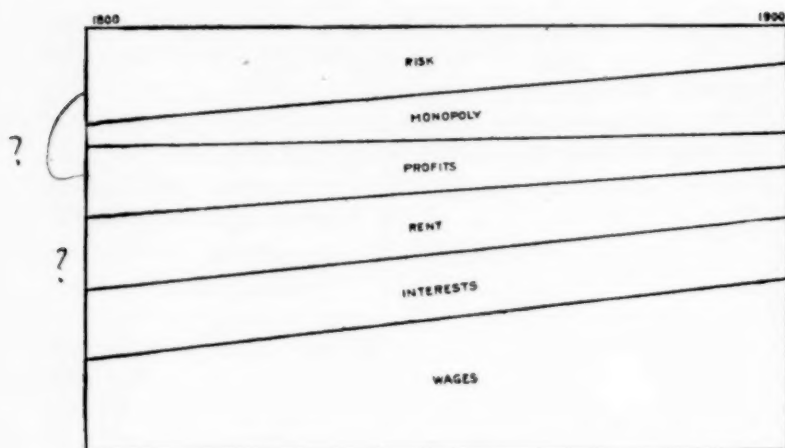
At present there are four classes of property that gain a relatively large share of the benefits of improvements and whose values and costs are most frequently watered. These are the railroads, protected industries, western farms and city land. A city lot valued at \$100,000 or a western farm that sells at \$100 an acre represents a higher proportion of watered values than do railroad stocks or the protected trusts. The application of the principle of physical valuation to railroads does not mean any advantage to the public so long as the same principle is not applied to farms and city lots. Low railroad rates mean a high value of western farms with higher rents and more congestion of population in eastern cities. Should the value of western farms go up to \$150 an acre because of lower rates, it does not mean that western farm laborers will get more wages, or that farm produce will sell at a lower price in eastern cities. Higher land values will push the country population into cities more rapidly than before and the pressure to lower wages will be strengthened. These conditions will make apparent the advantage of extending to land the same principle of physical valuation that landholders now want to have applied to railroad property and to protected industries.

The doctrine of costs prices, the physical valuation of property

and the control of prices by the state cannot but bring on a series of class conflicts in which the minority will suffer at the hands of the majority; for the kinds of property that are in the fewest hands will be those to which this principle will be first applied, and each other kind of property will be attacked in turn until the application of the principle is general. The dilemma of the principle of physical valuation is that a limited application of the principle does not aid the public; it merely lowers the value of one form of monopoly and raises that of some other. Farms go down in value as railroad rates go up. Land values in cities go up as tariffs go down. Some special class gains by the price changes which the introduction of cost prices in other quarters creates. The public gains nothing by these price conflicts, however the state settles them. To permit it to control some prices is to give it the power to favor special interests; on the other hand, if it control all prices the state becomes socialistic.

It is often said that the way to avoid socialism is to control particular prices such as railroad rates or tariff schedules; but this control will not help the public so long as other forms of monopoly remain undisturbed. Partial socialism does not cure socialism, because it does not remove the evils of which the public complains. It merely reduces the rate of progress, and thus, by the stagnation it creates, gives new strength to the demand for more thorough-going socialism. The line of cost is the line of bankruptcy, and the state must soon take over any industry or enterprise that must face unexpected costs but cannot retain extra gains. We cannot get free trade through low tariffs, cheap food through low railroad rates, lower house rents by reducing the price of street-car transportation, nor can we get natural low prices through state control of particular industries.

While monopoly cannot be prevented, its amount can be reduced by the increased power of substitution which improvements bring. The gains of monopoly are temporary, due to sudden increases of productive power. But each generation will see its sphere reduced, for the power of substitution constantly works against monopolies, as it works adversely to rent, profits and interest. Wages will gain what these shares lose, and will in each generation form a larger part of the price of commodities. The changes that time brings can be illustrated in a diagram, as follows:



The area of this diagram represents the total price of commodities, while the shares of the various factors are shown by the distances between the lines that divide the area into parts. The changes of the past century can then be pictured by the alterations in the distance between these lines. It shows that wages have steadily increased while rent, profits and interest have fallen off, not in amount, but in the part they play as elements of price. Special monopolies have increased in amount, but not in a way to increase prices, as the element of risk has decreased more rapidly than monopoly has increased. So long as the gains of special monopolies are not larger than the reduction of risk there is no transfer of income to them from any other class.

America is now at the point in its national development where these monopolies are at their maximum. Should a diagram of the price movements of the next century be made similar to the one just given, special monopolies would be a falling share like rent or interest, while wages would continue to rise even more rapidly than in the past. There is no danger of a permanent increase of industrial monopoly. The new forms that arise will displace those now existing as new forms of profits appear with each change in the industrial situation, only to disappear again with the spread of knowledge and efficiency. We can thus work away from a condition of monopoly through the alterations in industrial conditions, but we cannot crush monopoly nor make sudden reductions in its total amount. Public policies to be effective must reach it indirectly

by changes that increase the rate of progress. We cannot afford to check progress in order to test an untried principle in the distribution of wealth.

Thus far improvements in distribution have been effected by the slow diffusion of income and intelligence that follows the general uplift of mankind. Much more is to be gained by a redistribution of population so that the national resources will be better utilized than by any scheme for the forceful alteration of prices, or the redistribution of property. The real remedy for a bad distribution of wealth is more capital to develop our unused resources. We should have double the amount of capital invested in railroads and even more in our industries. The rate of return on capital that secures progress through new investments must be higher than the rate of return that preserves capital.

The redistribution of population following improvements in transportation will eradicate what now seems an evil in distribution, but which in reality has its cause in the present bad location of population and industry. The road to prosperity is not through class conflict, with its mulcting of the minority,—it is rather in social improvements that take men from the margin of production and place them in contact with better resources and in more favorable situations. Civilization is a change in conditions, not an increase in fighting power. It is a movement from conflict to harmony, from a brutalizing environment of individual discords to one of peace, sympathy, and co-operation. The power that moves the race forward is that which brings the feelings and interests of men into accord, which takes men from groups with local conflicting claims, and merges them into a solid, unified nation.

Only general far-reaching changes can give a new environment and free mankind from the depressing restraints that cause misery and poverty. Two plans for the increase of equality are open; either there must be a sacrifice of those having economic advantages in the hope that their loss will be a gain for others less advantageously situated, or there must be social work on the part of those economically favored directed towards a change in the conditions under which the poor live. Both plans have a morality, but one is the primitive morality of sacrifice, while the other is the economic morality of work. Both take income from the well-to-do; the one gives it to the poor to use as they will; the other takes

it to improve external conditions from which all benefit. Primitive justice demands the giving up of all we have for the poor; economic justice consists, not in giving up positions of advantage, but in creating similar positions for other people. It is only the extension of opportunity, the growth of efficiency, the spread of knowledge and the increase of health that can cause poverty to disappear and give a secure income to every family.

A program of social improvement thus demands work rather than sacrifice. Wages should be raised, not by giving income to workers in poor situations, but by moving them to positions of advantage in other localities and industries. Social work consists in moving people from the margin instead of aiding them at the margin. It takes men from places where poverty and disease oppress them and gives them the full advantage of a better position. It gives to the city worker the room, the air, the light and the water that the country worker has, but without his inefficiency and isolation. It gives more working years and more working days in each year, with more zeal and vitality in each working day. Health makes work pleasant, and pleasant work becomes efficient work when the environment stimulates men's powers to the full. Poor land must be made good land; desert land must be made to yield a generous return; the uplands must be turned into forests so as to protect the richer lands of the valleys; the unskilled worker must be transformed into an efficient citizen; the irregular trades into which marginal men flock must be safeguarded so that they will stimulate and elevate the worker instead of lowering his life and vitality. Children must be kept from work and women must have shorter hours and better conditions. Men can thus be moved from the margin and an equality secured through the more generous return which the new situations give. By these means the incomes and personal efforts of those favorably situated can reduce the evils of poverty without the destruction of the advantages upon which their welfare and the progress of society depend.

The nation can gain economic equality by moving forward; it can regain primitive equality by a reassertion of cost standards. A clear perception of this contrast will free the American people from the difficulties of their present situation. We cannot compromise between opposing programs for social betterment. We must do more work for others or suffer severe losses at their hands.

PART THREE

The Government and the Railways

THE PUBLIC AND THE RAILWAYS

BY HONORABLE MARTIN A. KNAPP,

CHAIRMAN OF THE INTERSTATE COMMERCE COMMISSION, WASHINGTON, D. C.

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BY ROBERT MATHER,

PRESIDENT ROCK ISLAND COMPANY, NEW YORK.

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BY EMORY R. JOHNSON,

PROFESSOR OF TRANSPORTATION AND COMMERCE, UNIVERSITY OF PENNSYLVANIA,
PHILADELPHIA.

THE NATION AND THE RAILWAYS

BY STUYVESANT FISH,

NEW YORK.

FIVE YEARS OF RAILROAD REGULATION BY THE STATES

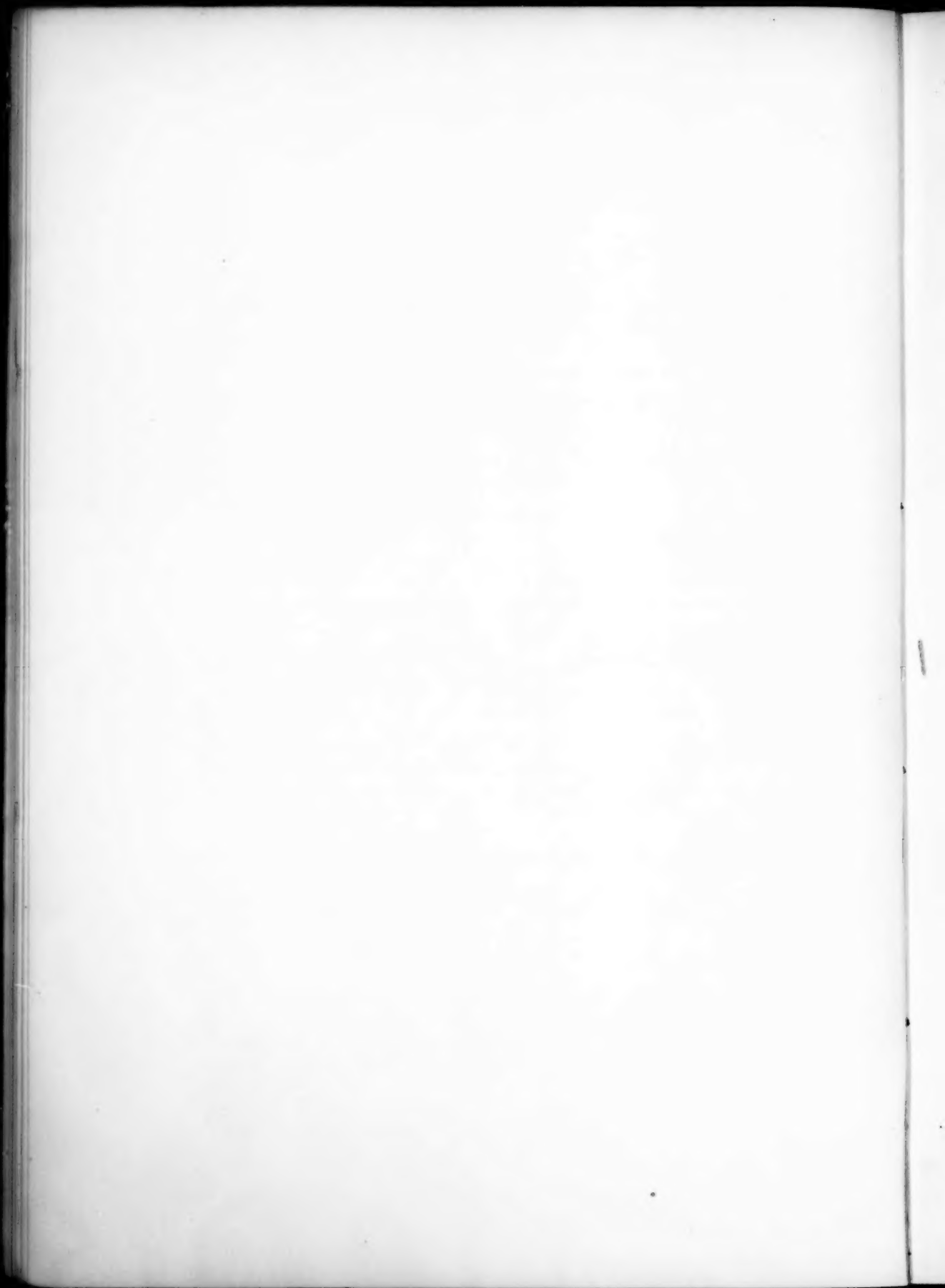
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HARRISON FELLOW IN TRANSPORTATION AND COMMERCE, UNIVERSITY OF PENNSYLVANIA, PHILADELPHIA.

REGULATION OF FOREIGN COMMERCE BY THE INTERSTATE
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BY WARD W. PIERSON,

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THE PUBLIC AND THE RAILWAYS

BY HON. MARTIN A. KNAPP,

Chairman of the Interstate Commerce Commission, Washington, D. C.

In the whole range of public questions, no topic more fittingly deserves the consideration of this influential body, because none is of such vital consequence to all the people of our common country. At this time especially, when we are nearing the end, let us hope, of a period of violent and sometimes misdirected agitation, an agitation provoked by methods and practices long in vogue but now happily nowhere defended, when we may confidently expect an early and healthy reaction in public sentiment, it is peculiarly appropriate that the members of the American Academy should take the lead in councils of sanity, and lend their powerful aid to the development of sound and helpful policies.

Speaking for myself alone, and disclaiming any right to represent on this occasion the official body with which I am connected, there are two or three phases of this subject with which my mind is particularly impressed and to which, with your permission, I may briefly refer.

It is a fact so obvious and familiar as often to lose its significance that the advent of steam and electricity as substitutes for animal power was the most important and transforming event in the industrial history of mankind. It wrought an immediate and radical change in the elementary need of society, the means of distribution. The primary function was suddenly and radically altered, and a veritable new world of opportunity was opened to the enterprising and ambitious.

As time goes, this revolution has been phenomenally rapid. In the passing of a generation, as it were, the railroad and the steamship have transformed the whole realm of industrial and social life. They have enriched every occupation, given multiplied value to each pursuit, added incalculably to the means of human enjoyment, made our vast wealth possible. They are at once the greatest

achievement and greatest necessity of our modern civilization. But we do well to remember that this marvelous achievement has been accomplished by private enterprise and private capital, and that we must look—we certainly should look—to that same source for its further and adequate development. Far distant be the day when any thoughtful man will seriously contemplate a different national policy.

But if we rely, as we should, on private enterprise and private capital to sufficiently increase our transportation facilities, we must make that primary activity so attractive in its opportunity and its responsibilities that it will command for its management the best and ablest men the nation produces, and sufficiently lucrative to induce the necessary investment of money to supply our further requirements. In a word, we need our foremost men in this primary service and a vast amount of capital to make it adequately successful. This simply means, as I take it, that whatever may be our national or state policy in other respects, whatever regulations may be prescribed or obligations imposed, there must be the opportunity to charge rates which will give sufficient earnings to make the business fairly profitable and to attract the needful capital for its ample extension. Without regard to the personnel of railroad officials, without regard primarily to the interest of stockholders, but in the interest of public welfare and national prosperity we must permit railway earnings to be adequate for railway improvement at advantage and profit.

To my mind it is a most impressive fact, so great as to elude the grasp of imagination, that the railway traffic of the country fully doubled in the first seven years of this twentieth century. This enormous addition to the volume of transportable goods overtaxed, as you know, the existing facilities, and the resulting condition perhaps accounts for much of the hostility which has been manifested in various quarters. For the man who has raised something by hard labor, or made something with painstaking skill, which he could sell at a handsome profit in an eager market, and finds that he cannot get it carried to destination, and so sees his anticipated gains turned into a positive loss, is naturally exasperated and unthinkingly "blames it" on the railroads, and is ready to hit them with anything he can lay his hands to; and as

the state legislature seemed to be the most convenient weapon he wielded it for all it was worth.

I dwell upon this for a moment further, because it seems plain to me that the prosperity of the country is measured and will be measured by the ability of its railroads and waterways to transport its increasing commerce. With a country of such vast extent and limitless resources with all the means of production developed to a wonderful state of efficiency, the continued advancement of this great people depends primarily upon such an increase of transportation facilities as will provide prompt and safe movement everywhere from producer to consumer; and that we shall not secure unless the men who are relied upon to manage these great highways of commerce have fitting opportunity, and the capital which is required for their needful expansion is permitted to realize fairly liberal returns.

In connection with this I have another thought. It is an old story, but we are all impressed with the inequalities of human conditions. We know that the bountiful earth and the skill of men produce abundance for the comfort and happiness of all our people; and yet we find so many, alas! far too many, in approximate if not actual poverty. And I take it that the underlying social problem is to find some way, consistent with justice and the maintenance of our free institutions, to bring about the more equable diffusion of the bountiful wealth with which we are endowed.

Now as a practical matter what better step can we take or what better methods adopt than to see that the wage-earning classes of every description are liberally paid. More than three-fourths of all our people are wage-earners. Their ability to buy and consume makes the prosperity of the country; and if our laws, our institutions, our social customs, our public regulations, and, above all, our public sentiment, are such as to insure ample compensation to every class of wage workers, we thereby maintain and increase the consuming power of the vast majority of our people, and do more than in any other way to insure our future progress.

Now it happens, as you all know, partly from the nature of the calling, which appeals to the imagination of young men for its novelty and its opportunity, and partly because of the strength of railway labor organizations, which for the most part have been

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prudently managed by astute and able leaders, that the general scale of wages in railway service has been materially higher than in corresponding private pursuits, and this in turn has doubtless had a strong reflex influence upon wages paid in private employment, so that those engaged in the fundamental industry, the one which ministers to the primary need of society, being fairly well paid, speaking at least in a relative sense, the influence is potent to hold up the wage scale in every sphere of private occupation. And so I not only want railway earnings to permit of rapid and sufficient railway extension, which increased facilities for comfort and convenience, for speed and safety, but I want all that to be accomplished by and connected with the most liberal compensation to an adequate force of competent employees.

Therefore it is a great satisfaction to me that at this critical juncture, under the abnormal and distressing conditions which have lately prevailed, arrangements have been made by which the wage scale in railway service is not to be invaded, at least until the lapse of time shows the necessity for resort to that method of reducing expenses; and I congratulate our railway friends and the country at large that means have been devised for carrying this great industry over this critical period without attempting a reduction in the wages of railway employees. And I am gratified that this has been the policy of railroad managers, because any other course would not only have affected the efficiency, the loyalty and the incomes of the million and a half of railway employees, but a reduction in the scale of wages in this public service would necessarily have had a very powerful effect in reducing wages in every grade of private employment, and thus unfortunately and as I think unnecessarily diminishing the purchasing power of a great majority of all our people.

A single word further. In the treatment of this great national question we should provide not only for the adequate enlargement of our transportation facilities, with the maintenance of a liberal and I trust a progressive scale of wages to railway employees, but we should also support the policy, which in my judgment is necessary to the desired result, of permitting a degree of associated action between railroads which existing laws unfortunately prevent. And to my mind there is no recommendation of our

great President which displays more practical sagacity or indicates a higher range of statemanship than his earnest appeal to the Congress to modify the absurd and mischievous anti-trust law. For the time has come, as I think, when we must by one means and another, as opportunity offers, find the best and least disturbing way of transforming our whole industrial life from the competitive to the cooperative basis. Therefore I welcome and applaud those measures of legislation, and that national policy supported by public opinion, which will give us more railroads and better railroads, more railway employees better paid, and the widest cooperation in the conduct of this public service.

HOW THE STATES MAKE INTERSTATE RATES¹

BY ROBERT MATHER,
President Rock Island Company, New York.

The widespread efforts of state legislatures and railroad commissions within the past two years to reduce railroad rates have presented many interesting phases to public observation. The extent and severity of the proposed reductions, the novel expedients adopted to prevent or to make difficult a review of the state action in the federal courts, the resulting conflict of judicial authority and the recent decision of the Supreme Court of the United States holding these expedients unconstitutional have kept the movement constantly in the public mind. Out of the many questions which discussion of the situation has evolved none are more interesting or important than those relating to the effect of state-made rates upon rates for interstate transportation. It is the purpose of this article not to show that the rate-making power of the states should be diminished or destroyed, or that this object, if desirable, can or cannot be accomplished under the federal constitution, but merely to state and to illustrate the proposition that, in fact, the states *do* make interstate rates.

The great movements of traffic in this country are eastward and westward. The volume of the westward movement has always been high-class merchandise,—dry goods, wearing apparel, groceries, hardware, and like articles. Formerly this was all produced in the East or imported through Atlantic ports; it is only within recent years that the larger cities in the West have become manufacturing centers.

When the evolution of our rate fabric began New York, Boston, Philadelphia and Baltimore were the bases of supply. Chicago, St. Louis, St. Paul, Omaha, and Kansas City owe their development as trade centers primarily to strategic location at the head of navigation, or at points where the trans-continental trails left the water-courses for the West, Northwest, and Southwest. They com-

¹Much of the matter and all the maps for this article were prepared by Mr. Theodore Brent, of the Traffic Department, Rock Island-Frisco Lines, Chicago.

menced as outfitting points for prospectors and settlers; their business was that of distributing through the new Western country the articles of commerce manufactured in or imported through the East; and that still constitutes a large part of their trade.

When railroads found their way to Chicago and St. Louis their rates were fixed largely by the water competition which met them on their arrival. Gradually railroads were constructed westward from these points and, as they reached common territory, the force of competition began to be felt. Intense rivalry developed between the distributing houses of Chicago and St. Louis, and pressure was brought to bear upon the railroads, both East and West, to keep the rate fabric so adjusted that goods, stored in and distributed from either city, might be laid down at any of the Missouri River points at substantially the same freight cost. The class-rates from New York to Chicago thus became the basis of measurement for all class-rates. The St. Louis rate was a fixed per cent higher, approximating the difference in the cost of reaching that point by water. The rates between the Mississippi River and Chicago on the one hand and the Missouri River on the other were fixed not at what would be a reasonable rate for the distance, but at what it was necessary to maintain in order that St. Louis and the lines leading through St. Louis might compete with Chicago for the expanding business of Kansas City, Atchison, St. Joseph, and Omaha.

In the territory west of the Missouri River the same process has been repeated, and rates are maintained in such relation not only that Kansas City, St. Joseph and Omaha may compete with each other, but that goods distributed from St. Louis and Chicago, as well as from the Eastern cities, may be handled through either Kansas City, St. Joseph or Omaha and laid down at the several consuming points at practically the same freight cost. In the Northwest this same competitive adjustment is maintained between Chicago, Duluth, Minneapolis and St. Paul. In the Southwest, Chicago, St. Louis and Kansas City must be kept on an even keel, and when Texas is reached, the whole adjustment is modified to meet the competition of coastwise steamers plying from New York to Galveston. To Colorado and Utah, the routes through all these gateways are kept in constant adjustment, and the rates so arranged that Denver and Pueblo are enabled to do a distributing business,

What is true of westbound merchandise is equally true of the movement to the East of the great staples raised in the West. The grain territory is so divided and rates are so made that grain may move freely to the Mississippi River, the lakes and the gulf, through the great storage centers of Minneapolis, Duluth, Chicago, St. Louis, Omaha and Kansas City. In like manner live stock rates are so arranged that the traffic may move freely to the rival packing centers of Kansas City, St. Joseph, Omaha, St. Paul, Chicago and St. Louis.

These rate relations are not the work of the traffic departments of the railroads. They do not exist by virtue of acts of legislatures or of orders of commissions. They are the resultants of the commercial growth of the country. Trade is established along these lines; industries and communities are founded on the basis of these adjustments, and their existence and prosperity depend upon the continuance of these rate relations. They are the controlling facts in all rate disputes—more stubborn than distance and as immovable as mountains.

There is hardly a rate on any article of commerce but feels the force of these competitive conditions. They absolutely dictate the traffic policy of the railroads operating in the territory affected by them. The carrier makes no rates that are not effectively moulded by these conditions, and the rate-making power of the Interstate Commerce Commission itself cannot ignore them. The only rate-regulating body that makes rates without reference to these commercial conditions is the legislature or the railroad commission of a single state. Its field of operations includes but a fraction of the territory whose traffic is controlled by these conditions; contains but few of the larger distributing centers which compete for that traffic; and is usually circumscribed, either wholly or in part, by imaginary boundaries fixed without regard to factors which exercise controlling influence upon the trend of traffic and of rates. The influence of lakes, of rivers and canals, the competition of rival markets, the relation between manufacturer and dealer, and other like forces that, in the making of rates, confront the traffic officer of an interstate railroad and the Interstate Commerce Commission itself, enter but slightly, if at all, into the calculations of the state. In every case, in the exercise of its rate-making power, distance is the one factor given serious consideration; and

the result of its labors is invariably the production of a distance tariff.

This state distance tariff, is, on its face, a simple and a harmless thing. The right of the state to make it and to change it at its will seems to be amply buttressed by the conceded principle of law that the power of Congress over interstate commerce leaves untouched the power of the states to regulate their purely internal commerce. And no simpler or less obnoxious method of exercising that power would seem possible than to prescribe the rates at which traffic shall move from point to point within the state.

But when the traffic officer of an interstate railroad comes to apply this state distance tariff, made for state use on purely local considerations, to the traffic that actually moves over his rails, he finds that he cannot confine its influence to traffic within the state, and that, against his will and without his action it readjusts his rates into and out of and through the state, and determines his revenue on traffic that never traverses the borders of the state. This is illustrated by the action of the following states:

Missouri and Iowa

Missouri has a far-reaching control over interstate rates by reason of the situation of the state at the point of least distance between the Mississippi River—the basing line for rates from the East—and the Missouri River, the base line for rates to the West.

There are three factors which go to make up the rates from the East to the Western territory—whether or not they are published as through rates—namely, the rate from the seaboard to the Mississippi River or Chicago; the rate from the latter base line to the Missouri River; and the rate west of the Missouri River. Reduce the rate between the Mississippi River and the Missouri River and you reduce the rates on all business either locally or through or beyond these base lines.

The first-class rate between the Mississippi and Missouri Rivers practically determines the interstate rates on all classified articles moving between the East and West. It is at present 60 cents per 100 pounds, this being the figure fixed by the Missouri Railroad and Warehouse Commission as a reasonable maximum rate for the short-line haul of approximately 200 miles across the state from the Mississippi to the Missouri—the distance from Hannibal to St.

Joseph being 196 miles, and from Hannibal to Kansas City, 199 miles. Note the chart:



Though this rate is based on the distance of 200 miles, competitive conditions outside the state apply it at once to all hauls across the state, no matter what their distance. The short line from St. Louis to St. Joseph is 302 miles, and lines operating between those cities would be privileged, under the commission's maximum scale, to charge 74 cents, first class. The short line between St. Louis and Kansas City is 277 miles, for which distance the Commission's scale is 71 cents, first class. But here considerations enter which are entirely outside the horizon of the Missouri commission. The rates from New York to Hannibal and St. Louis are the same. There are routes leading from New York to St. Joseph and Kansas City, through both Hannibal and St. Louis. Kansas City and St. Joseph compete in the same trade territory, and the rates to both points from New York must be kept the same through all gateways. Consequently the Commission's maximum rate for the shortest distance becomes the rate between all four crossings:—



Thus the element of distance even between points within the state is immediately modified by outside forces, controlling with the carriers, but which exerted no influence upon the commission when it fixed the nominal measure of the rates.

Just north of Missouri lies the State of Iowa. To the untutored mind there would seem to be no reason why traffic of the same class should move within the State of Iowa for a less charge than within the State of Missouri. Yet the maximum charge under the Iowa distance tariff for hauling first-class merchandise 200 miles is 40 cents, as against 60 cents fixed by the Missouri tariff. The railroads in Iowa must haul the same class of merchandise 350 miles to be entitled to charge 60 cents, but, significantly enough, the 350 miles measure the distance in Iowa between the Mississippi and Missouri rivers, so that the rate between the two base lines is the same in both states. Should Missouri adopt the Iowa scale, the Missouri rate from the Mississippi River to the Missouri River, between all the points in Missouri that we have been considering, would, for the reasons already given, at once become 40 cents, regardless of distance.

The effect within the State of Missouri, however, is only the beginning. The rate between the Mississippi and Missouri rivers being, as previously explained, one of three factors of a through adjustment from points of production in the East; the rates from the East to all Mississippi River crossings being the same; there being competitive routes from the East to all Missouri River points passing through all of these Mississippi River crossings; and the merchants and manufacturers in the Mississippi River cities maintaining trade relations with all of the Missouri River cities and with the territory reached through them; it follows that the rate between Dubuque, Ia., and Kansas City, Mo., cannot be higher than the rate between Dubuque and Council Bluffs (both points within the State of Iowa); nor can the rate between St. Louis, Mo., and Omaha, Neb., be higher than the rate between St. Louis and Kansas City or between St. Louis and St. Joseph (movements wholly within the State of Missouri).

Thus from the act of the Missouri commission in reducing its distance tariff from 60 cents to 40 cents for 200 miles, the following results directly flow:

(a) The local *Missouri* rate from points on the Mississippi River to points on the Missouri River, regardless of mileage, is reduced from 60 cents to 40 cents;

(b) The local *Iowa* rate from points on the Mississippi River to points on the Missouri River (say Clinton to Council Bluffs, 350 miles) is reduced from 60 cents to 40 cents;

(c) The *interstate* rate from points on the Mississippi River in Missouri to points on the Missouri River in Iowa or Nebraska (say St. Louis to Council Bluffs or Omaha) is reduced;

(d) The *interstate* rate from points on the Missouri River in Missouri to points on the Mississippi River in Iowa (say Kansas City to Davenport) is reduced.

Not only this, but this Missouri commission rate for 200 miles fixes the maximum rate which the Missouri Pacific Railway may charge for its haul of 488 miles between St. Louis and Omaha, through Missouri, Kansas and Nebraska; and in like manner the rate of the Illinois Central Railroad for its haul of 703 miles between the same points, through the States of Missouri, Illinois and Iowa. See the map.

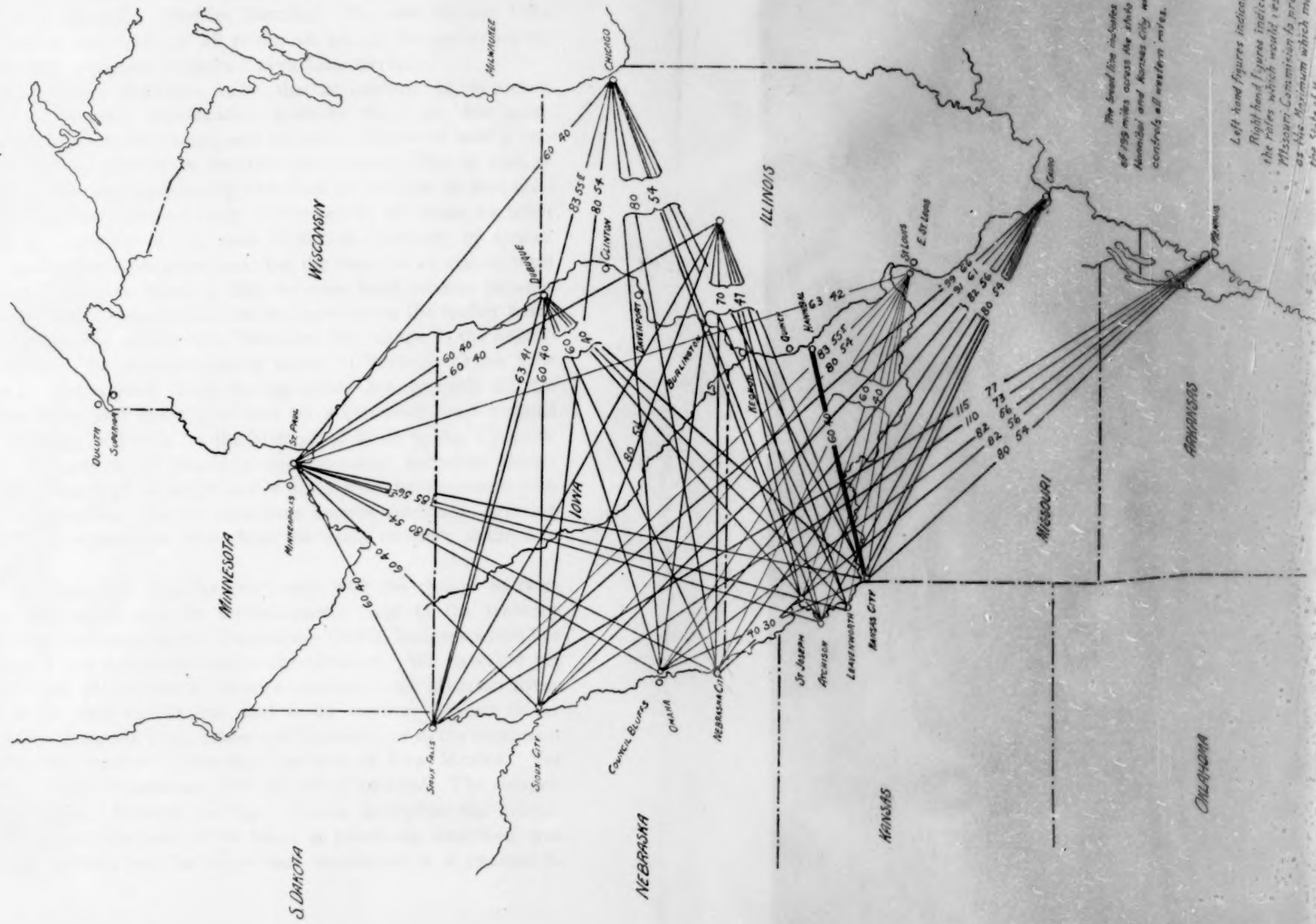


Thus, within the territory enclosed by the Illinois Central, Missouri-Pacific and Rock Island as outlined on the map, any reduction made by the Missouri commission in the class rates for the 200-mile distance between Hannibal, Mo., and Kansas City, Mo., has the effect of bringing all rates to the level so fixed, not only between the crossings themselves but, with very slight exceptions, between all intermediate points.

This, again, is but a preliminary glimpse at the inevitable results of this action of the Missouri State Commission.

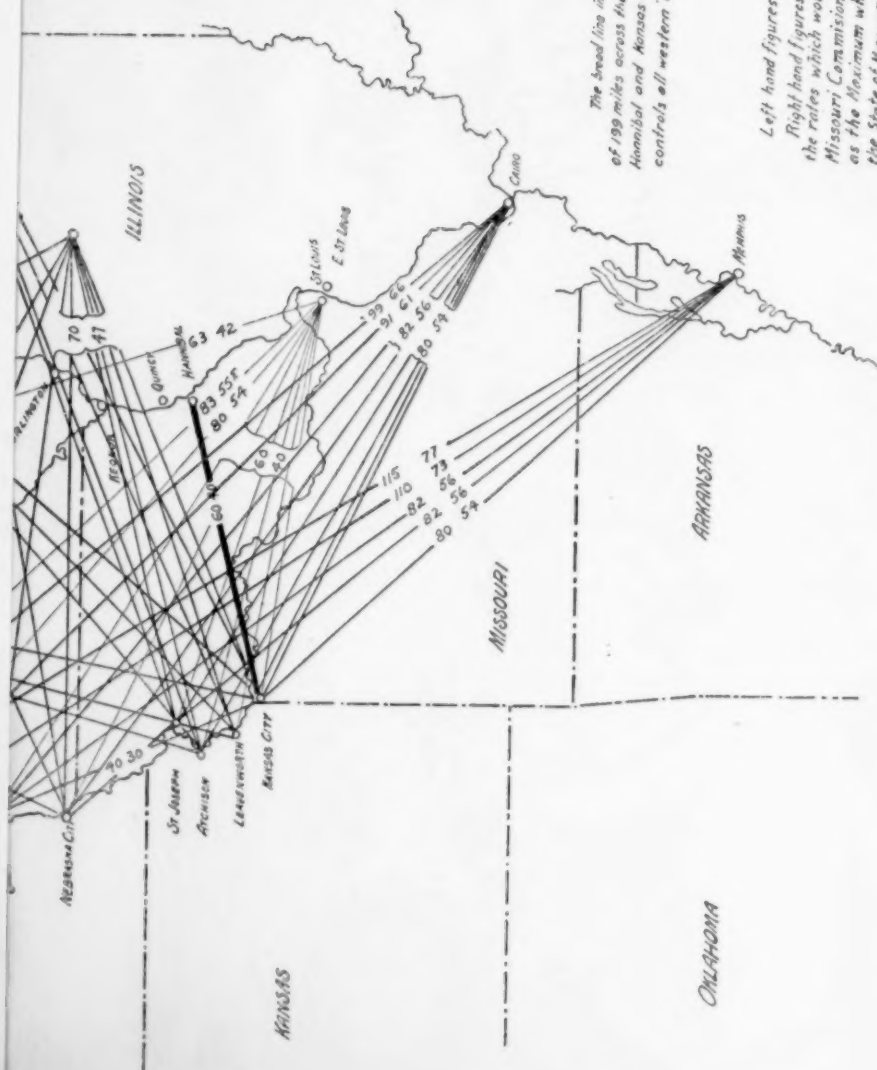
The first-class rate from Chicago to the Missouri River has for many years been 20 cents per 100 pounds higher than the rate from the Mississippi River. The competitive adjustment would require that there be no greater difference under the new scale. Indeed, the rates from the seaboard to Chicago and the Mississippi River remaining as at present, it is doubtful if Chicago and the routes through Chicago could compete should the present arbitrary difference be maintained under the reduced adjustment. The present rate of 80 cents, first class, from Chicago, is one-third higher than the rate from the Mississippi to the Missouri River. It is probable that not more than one-third greater would be practicable under the lowered scale, which would make the first-class rate from Chicago 54 cents per 100 pounds.

Peoria must be maintained at one-half the difference between Chicago and the Mississippi River. Milwaukee must be kept on the same rate basis as Chicago. The rates from Minneapolis and St. Paul must be kept the same as Chicago to the Upper Missouri River crossings (Omaha, Council Bluffs and Nebraska City), and 5 cents higher than Chicago to the lower crossings (St. Joseph, Atchison, Leavenworth and Kansas City). Duluth takes fixed arbitraries above St. Paul. The intervening territory in Wisconsin, between Milwaukee and St. Paul, is built on arbitraries over either Chicago, Milwaukee or St. Paul, and would call for readjustment accordingly. From Memphis, Tenn., not higher than Chicago rates can be maintained to Lower Missouri River crossings, and to the upper crossings the first-class rate from Memphis cannot be more than two cents higher than Chicago. To Sioux City the rate from Chicago, St. Louis and Peoria must be kept the same as from Chicago to Omaha. The first-class rate from Memphis to Sioux City is to-day 30 cents higher, and from Minneapolis and St. Paul



The dashed line indicates the short line distance of 199 miles across the state of Missouri between Hannibal and Kansas City which measures and controls all western miles.

Left hand figures indicate present rates. Right hand figures indicate approximately the rates which would result were the Missouri Commission to prescribe the low scale as the Maximum which may be changed in the State of Missouri.



The broad line indicates the short line distance of 199 miles across the state of Missouri between Hannibal and Kansas City which measures and controls all western rates.

Left hand figures indicate present rates
Right hand figures indicate approximately the rates which would result were the Missouri Commission to prescribe the low rate as the Maximum which may be charged in the State of Missouri

20 cents less, than from Chicago to Sioux City, and the same percentage relation must be maintained on the lowered scale.

The immediate result, then, of the fixing by the Missouri Commission of a maximum charge of 40 cents, first class, for the distance of 200 miles between Hannibal, Mo., and Kansas City, Mo., is to fix the rates for all routes shown on the accompanying map of what is termed Western Trunk Line territory:

The outline illustrates only the adjustment of first-class rates. In Western classification territory there are five numbered and five lettered classes, and the other classes all bear a certain percentage relation to the first-class rates. This is true to the extent that any considerable reduction in the rate on first class involves necessary proportionate reductions in the rates on other classes—the severity of any such reduction lessening, of course, as the rates themselves grow less; but the rates on all classes must go down if one goes down, so that the same fixed relation between the classes may be maintained on the lower as on the higher basis.

Similarly, the outline only illustrates the change in the adjustment between the principal basing points in Western Trunk Line territory. But around these basing points are grouped all the adjacent cities and towns; so that an adjustment once reduced from Chicago, or Peoria, or the Mississippi River to the Upper or Lower Missouri River points, a corresponding reduction results from all points, both of origin and of destination, held common with these basing points. So the reductions become automatic, covering all interstate movements throughout the whole territory pictured in the outline.

The illustration thus far deals only with the change in rates on business which may be termed purely local to the territory immediately embraced in the illustration—that is, business which has both origin and destination within the territory. We have not yet touched upon that volume of Eastern business to the Missouri River cities, to St. Paul and Duluth, and to the territory beyond as far west as the States of Utah, Idaho and Montana, or to the southwest including the State of Texas and Territory of New Mexico. Yet the rates on this business are quite as vitally involved. The competitive adjustment between Chicago, Peoria, Memphis, the Mississippi River, and the head of the lakes, as previously described, was originally evolved and has since been maintained in a measure to

permit this merchandise to move freely by all routes in this Trans-Missouri, Northwestern and Southwestern territory. Whenever the Western factors of the through rates to this territory are reduced, the rates on such through business fall simultaneously with the rates on the local business.

Merchandise for this western territory moves from the East by every conceivable route. Every all-rail line and every conceivable combination of rail lines publish the rates. During lake navigation daily boats carry this merchandise to Chicago, Milwaukee and the head of the lakes. It is handled by steamer in connection with rail lines from every South Atlantic port from Norfolk to Jacksonville. There is a steamer load despatched daily from New York and given to the rail lines at the port of Galveston, Texas. The rate fixed by the authority of the State of Missouri, between Hannibal and Kansas City, and based on purely local considerations, has its leveling effect upon the rates on every pound of this vast traffic. The next map shows the ultimate reach of the rate-making power of Missouri.

It is true that the illustration has proceeded thus far on the assumption that Missouri might make a reduction in its existing class rates, and not on the fact that such reduction has been made. But Iowa has precisely the same control over interstate adjustments that the illustration demonstrates Missouri to have, and as matter of fact East and West class rates are what they are to-day because Iowa some years ago prescribed 60 cents as the maximum charge, first class, for the haul within its borders between the Mississippi and the Missouri rivers. The Iowa distance tariff of 1887 actually measures to-day the revenues of the interstate railroads on all interstate freight passing into or out of or beyond that state.

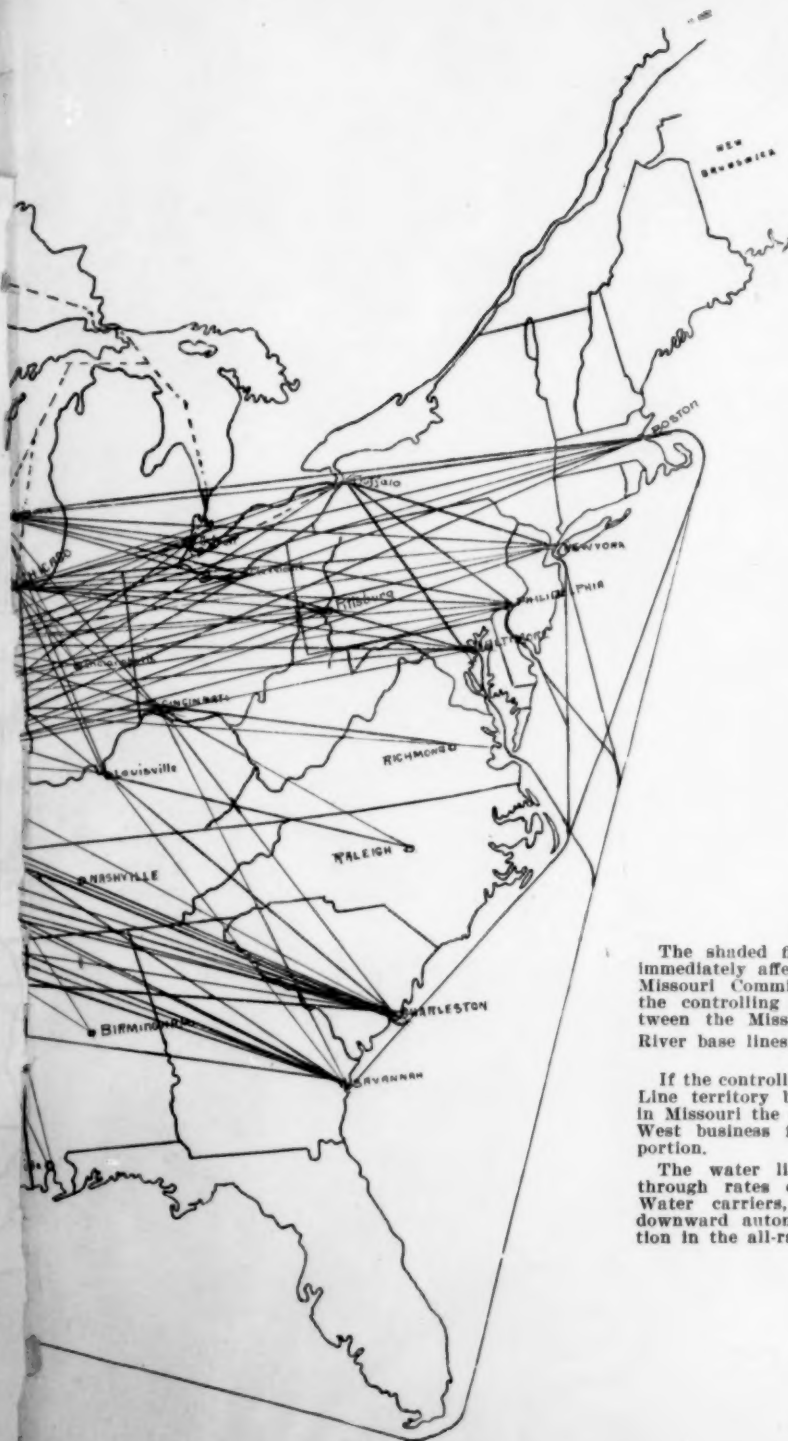
Besides, Missouri has actually made radical reductions in other rates that illustrate as well the principle of our contention. The legislature of 1905 ordered drastic reductions of rates on grain, flour, lime, salt, cement, stucco, lumber, agricultural implements, furniture, wagons and live stock, and the legislature of 1907 added stone, gravel, and other commodities. The rates have not been published, as the constitutionality of the legislation is in question before the courts, but if the state's right to order the reductions is finally established, the interstate rates on these bulk commodities,



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LEGEND.

The shaded field indicates the territory immediately affected by any change in the Missouri Commission's maximum rate for the controlling distance of 199 miles between the Mississippi River and Missouri River base lines.

If the controlling factor in Western Trunk Line territory be reduced by State action in Missouri the entire revenue on East and West business falls automatically in proportion.

The water lines indicate the principal through rates operated by the Rail and Water carriers, which move upward or downward automatically with any fluctuation in the all-rail rates.

which constitute a large percentage of the carload tonnage of all Western carriers, will come down with them.

The reductions which will result in rates on grain will illustrate. The short line distance rate between the Missouri and Mississippi rivers will be reduced from 13 cents per 100 pounds, on wheat, and 12 cents per 100 pounds on corn and other grain, to $8\frac{1}{2}$ cents per 100 pounds on all grain. The State's action also calls for a reduction of a half cent per hundred pounds in the proportional rate on wheat between Kansas City and Hannibal. This proportional rate of 9 cents is the rate applied on all wheat coming from beyond the Missouri River, and, as in the case of the class rates, it is the pivotal rate in the whole adjustment. If the legislature's action is finally upheld, a readjustment of the whole rate fabric on Western grain will result. There is no more sensitive adjustment in existence than the grain rates. No single part of any of the through rates can be disturbed without disturbing the revenue on a large part of the whole movement.

Competition and market conditions require that the rates on grain from the States of Kansas and Nebraska shall be so adjusted that the grain raised in those states can move eastward freely through either of the primary markets at the Missouri River, Kansas City or Omaha. When these markets are reached, not alone the grain markets of the United States, but the foreign markets as well must be open to the producer, so that the Nebraska or Kansas producer may have the benefit of the best prevailing market price of the world to-day; and the adjustment must be maintained from day to day so that the large grain buyers may take the surplus grain into elevator storage, not only at the Missouri River, but at the large storage points at the Mississippi River, the Ohio River, the lake ports, the milling centers, and the Atlantic and Gulf seaboard, with the full assurance that when the demand makes Eastern or Southern shipment desirable he will have a parity of rates in either direction through any market. If the reduced rates are finally enforced the material reductions within the state will be insignificant compared with the automatic reductions in the interstate adjustment which must follow. The same reduction must be made from Omaha, not only to St. Louis but to the other Mississippi River crossings; to Peoria and Chicago, the gateways to the central states; to Louisville, Evansville, Cairo and Memphis, the market

points for all the southeastern states; to Little Rock, Texarkana, Fort Worth, Dallas and Shreveport, the principal market gateways for the States of Arkansas, Louisiana and Texas; and to Minneapolis, the largest of the milling centers. Any reduction in the rate to the Mississippi River and Chicago means just that much reduction in the revenue on grain moving to Boston, New York, Philadelphia, Baltimore and Newport News for export, as these rates are all made on the Mississippi River combination. And when these rates go down, a similar reduction is forced in the rate to Pensacola, Fla., Mobile, Ala., New Orleans, La., and Port Arthur and Galveston, Texas, for export.

It has never been found feasible to carry local and proportional rates on the same basis, and there is therefore the probability of further reduction in the proportional basis. To what figure the proportional rate on wheat across Missouri might fall as the result of carrying a local rate of $8\frac{1}{2}$ cents is, of course, problematical. The rates up to this time have always been maintained about four cents lower than the local rates. The accompanying chart only illustrates the direct reductions in the existing proportional rates:

Kansas and Nebraska

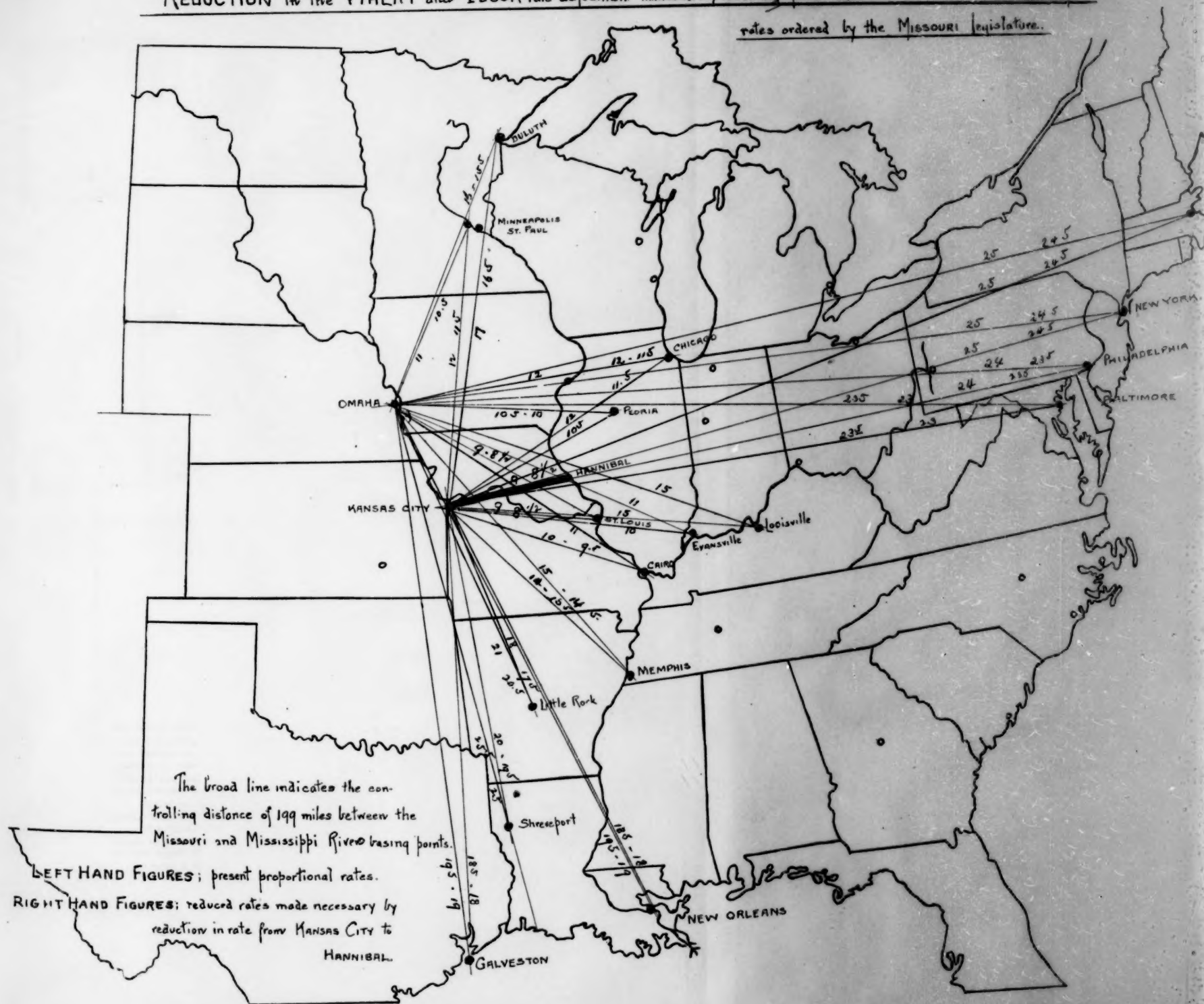
During the year 1907 the railroad commission of Kansas forced a reduction of 15 per cent in the existing rates on grain within the state. A reduction in grain rates always applies as well on flour, meal and other grain products. The Nebraska commission forced a 15 per cent reduction in state rates, not only on grain and grain products, but on live stock, coal, lumber and fruits and vegetables.

Kansas and Nebraska do not consume a hundredth part of what they produce, and the great bulk of the commodities consumed within these states is produced outside of them. The freight destined from points of origin within either state and moving under the state's mileage rates to points of consumption within the state, is as nothing to that which moves to points beyond the state. That is to say, nearly all the traffic of both the states is interstate, and subject to the influence of the competitive interstate rate adjustment.

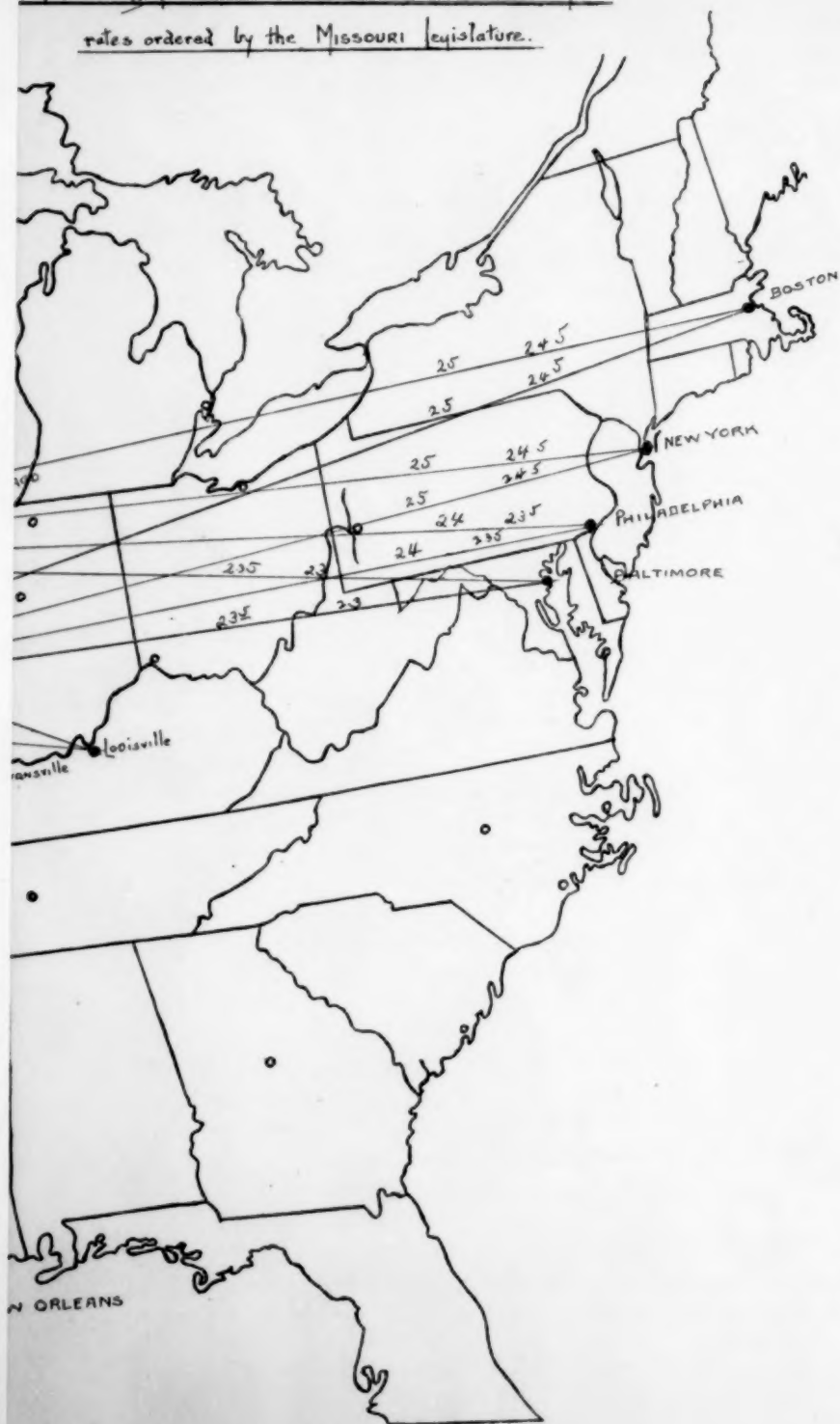
The products of Kansas and Nebraska find their primary markets (Kansas City, Kan., and Omaha, Neb.) on the Missouri River at the extreme eastern boundary of the state, and the state regulation fixes the rate at which the product is hauled from points of

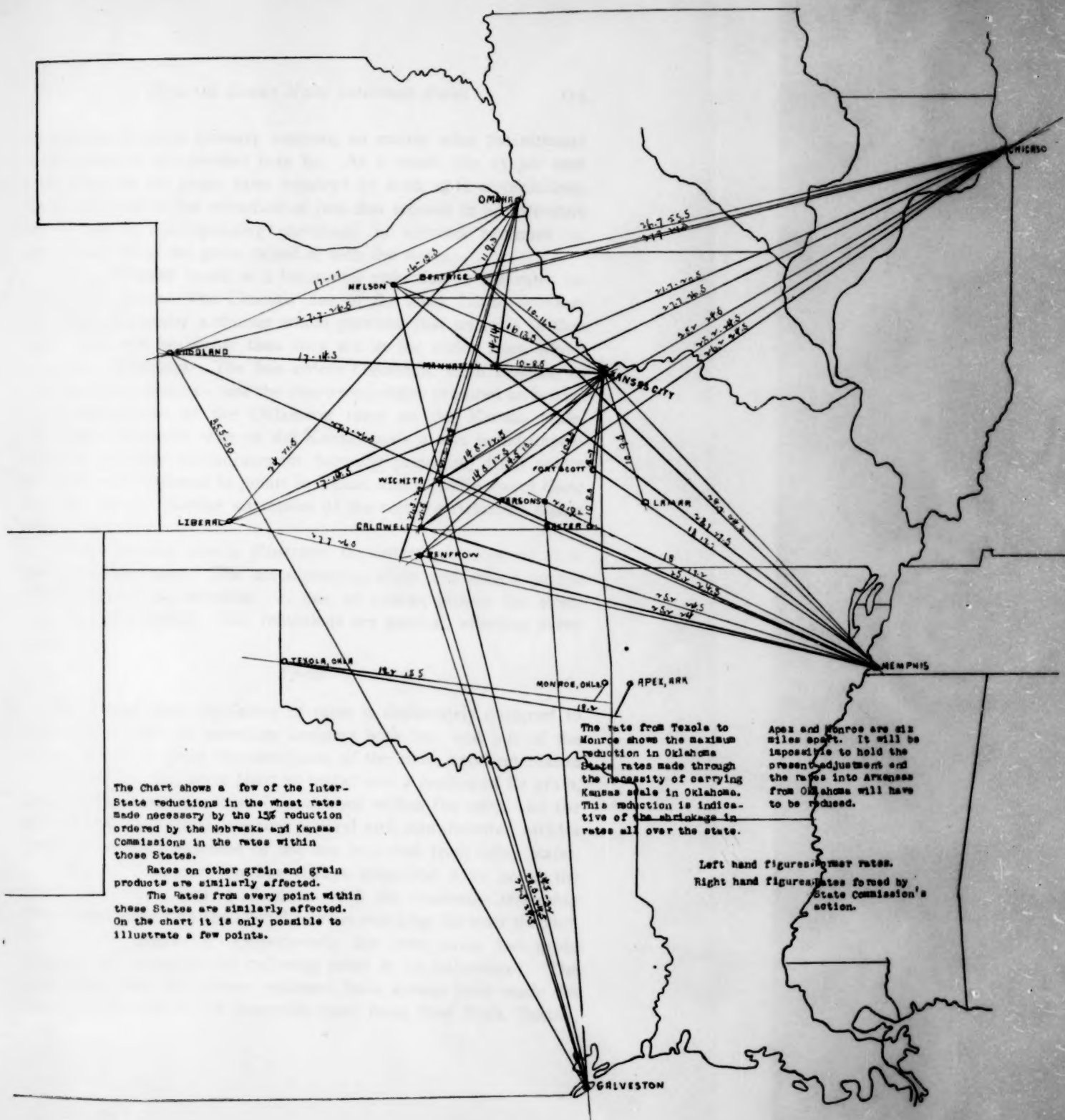
REDUCTION in the WHEAT and FLOUR rate adjustment immediately resulting from reduction in the STATE mileage

rates ordered by the Missouri legislature.



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rates ordered by the MISSOURI legislature.







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production to these primary markets, no matter what the ultimate destination of the product may be. As a result, the 15 per cent reductions in the grain rates required by both state commissions, have called for a flat reduction of just that amount in all interstate rates, and a corresponding shrinkage in railroad revenues on practically all of the grain raised in both the states.

A contingent result is a horizontal reduction in the rates on Oklahoma grain. The Choctaw line of the Rock Island operates in Oklahoma under a charter which provides that its rates in that state must not be higher than they are in the states from which it enters Oklahoma. The line enters Oklahoma from Kansas, as well as from Arkansas, and the charter provision required an immediate adjustment of the Oklahoma rates on the Kansas scale. With the Oklahoma rates on the Kansas basis it was found impossible to maintain the adjustment formerly prevailing from points in Southern Oklahoma to points in Texas, and a readjustment there was necessary. Similar reductions of the rates to Arkansas points will be required.

The situation clearly illustrates the interdependence of state and interstate rates. The accompanying chart will give a partial illustration of the situation. It can, of course, picture the effect only at a few points. The reductions are general, affecting every point:

Texas

In Texas, state regulation of rates is deliberately designed to control the rates on interstate business both into and out of the state. There is, from the standpoint of the state, excellent reason for this policy; for, aside from its timber and a portion of its grain, little which Texas produces is consumed within the state, and the bulk of the food stuffs, wearing apparel and manufactured articles which its citizens consume or use are imported from other states.

The state commission has always conceived it to be to the state's interest to link its fortunes with the coastwise steamship lines rather than with the all-rail carriers reaching the state through its northern gateways. Consequently the commission has made the port of Galveston the radiating point in its adjustment. The class rates from the eastern seaboard have always been made the exact combination of the steamship rates from New York, Boston,

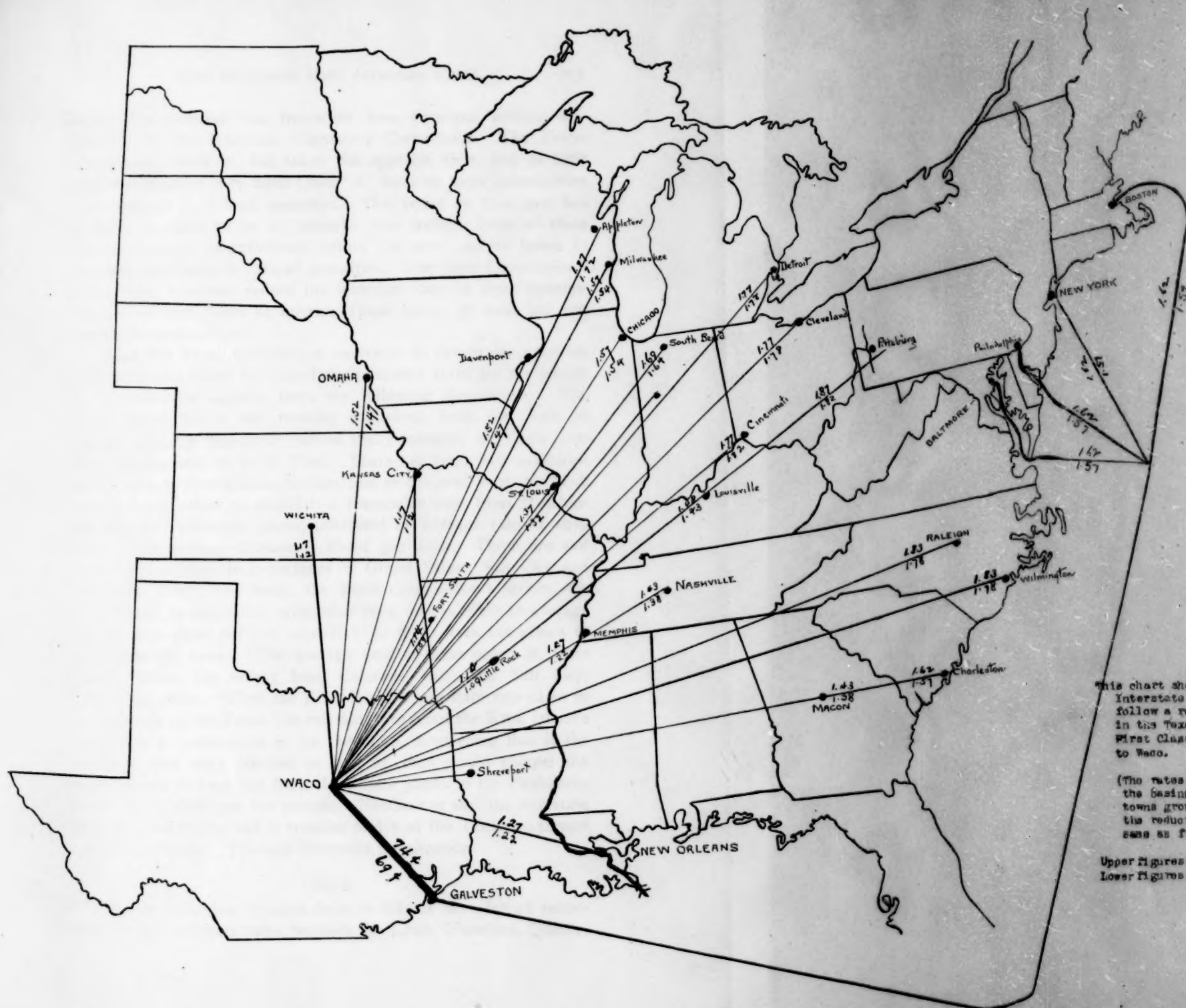
Philadelphia and Baltimore to the port of Galveston, plus the commission's local rates thence to every point in the state. This has forced the rail carriers to group all the producing territory west of seaboard territory, and to maintain a relative adjustment calculated to permit these territories to market their products in Texas in competition with the rates from the seaboard fixed for the rail carriers both in and outside the state by the Texas commission and the steamship lines.

It necessarily follows that whenever the Texas commission reduces a rate from Galveston the revenue of the state carrier on all Texas business originating at the Atlantic seaboard is lowered and the interstate carriers are compelled to make corresponding reductions from every other basing point. The immediate effect of a reduction of five cents in the commission's first class rate from Galveston to Waco is outlined in the accompanying chart:

Texas is above all a cotton-growing state. The wealth of its farming communities and the business of its cities are founded on the production and marketing of this staple. The revenues of the carriers within the state are largely dependent upon the movement of the cotton crop. Texas produces one-quarter of all the cotton grown within the United States. It has, however, no cotton-spinning industry worthy the name. Probably ninety-nine per cent of the cotton grown in the state is sent to New England and southeastern spinning points and to foreign countries. The revenues of the carriers on all this interstate and foreign cotton freight are absolutely dependent upon the rates fixed by the railroad commission of Texas to the port of Galveston.

Three years since, the commission ordered a reduction in cotton rates of 5 cents per 100 pounds or \$1.00 per ton. The movement from Texas to interstate and foreign destinations in the fiscal year ending June 30, 1906, was a million and a half tons. The direct result to interstate carriers from this one act of the commission has been an annual shrinkage in their revenues of something like a million and a half of dollars.

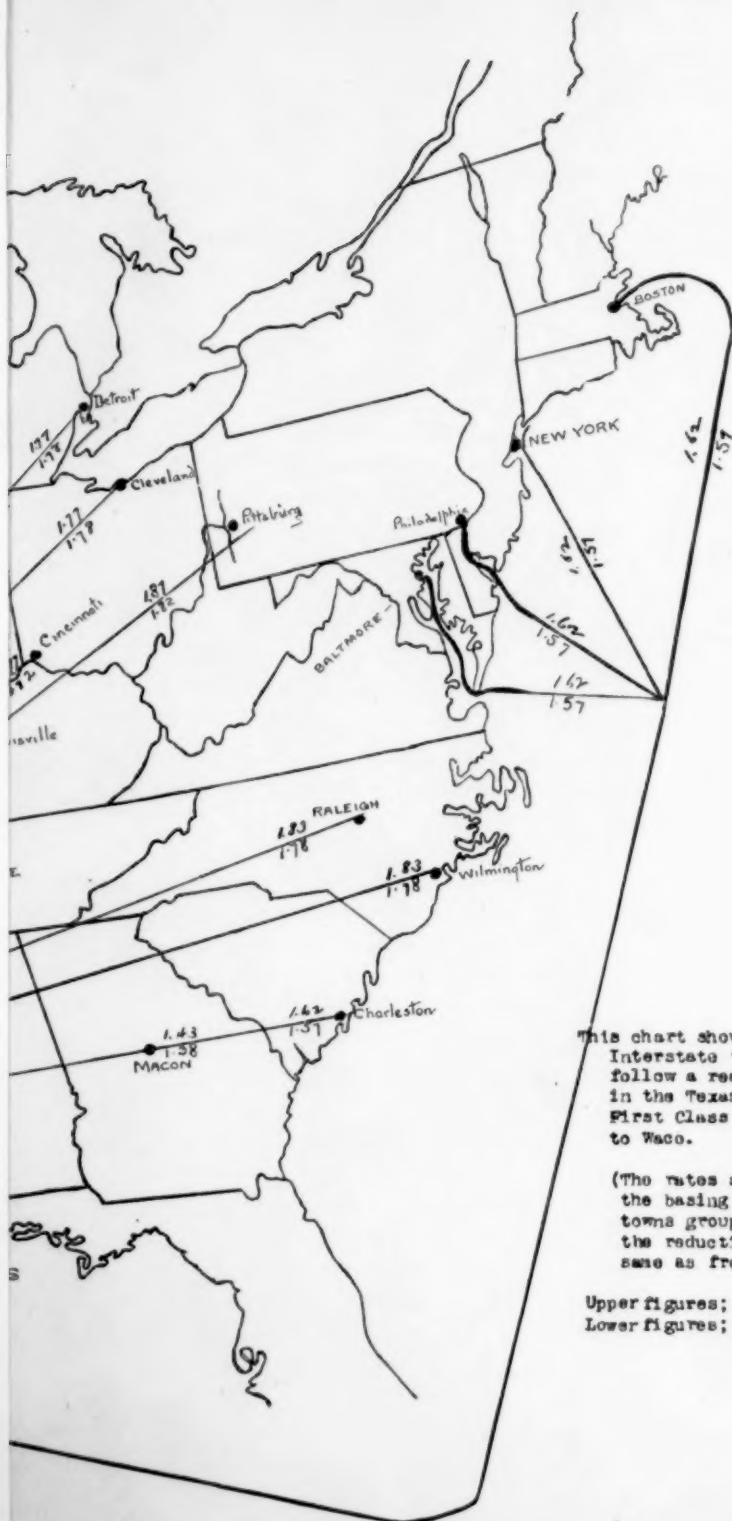
A cardinal principle in the three principal classification territories is that valuable commodities such as dry goods, notions, boots and shoes, hats, etc., shall take first-class rates, whether the goods are shipped in carloads or in less than carload quantities. There is no voluntary variation from this in any interstate adjust-



This chart shows the Interstate rates which follow a reduction in the Texas Railroad First Class Rate from \$1.00 to Waco.

(The rates shown at the basing points, towns group around the reduction from same as from the

Upper figures; Rates of Lower figures; Rates of



This chart shows the reduction in Interstate rates which would follow a reduction of Five Cents, in the Texas Railroad Commission's First Class Rate from Galveston to Waco.

(The rates shown apply only from the basing points. All other towns group around these and the reduction from all is the same as from the basing point.)

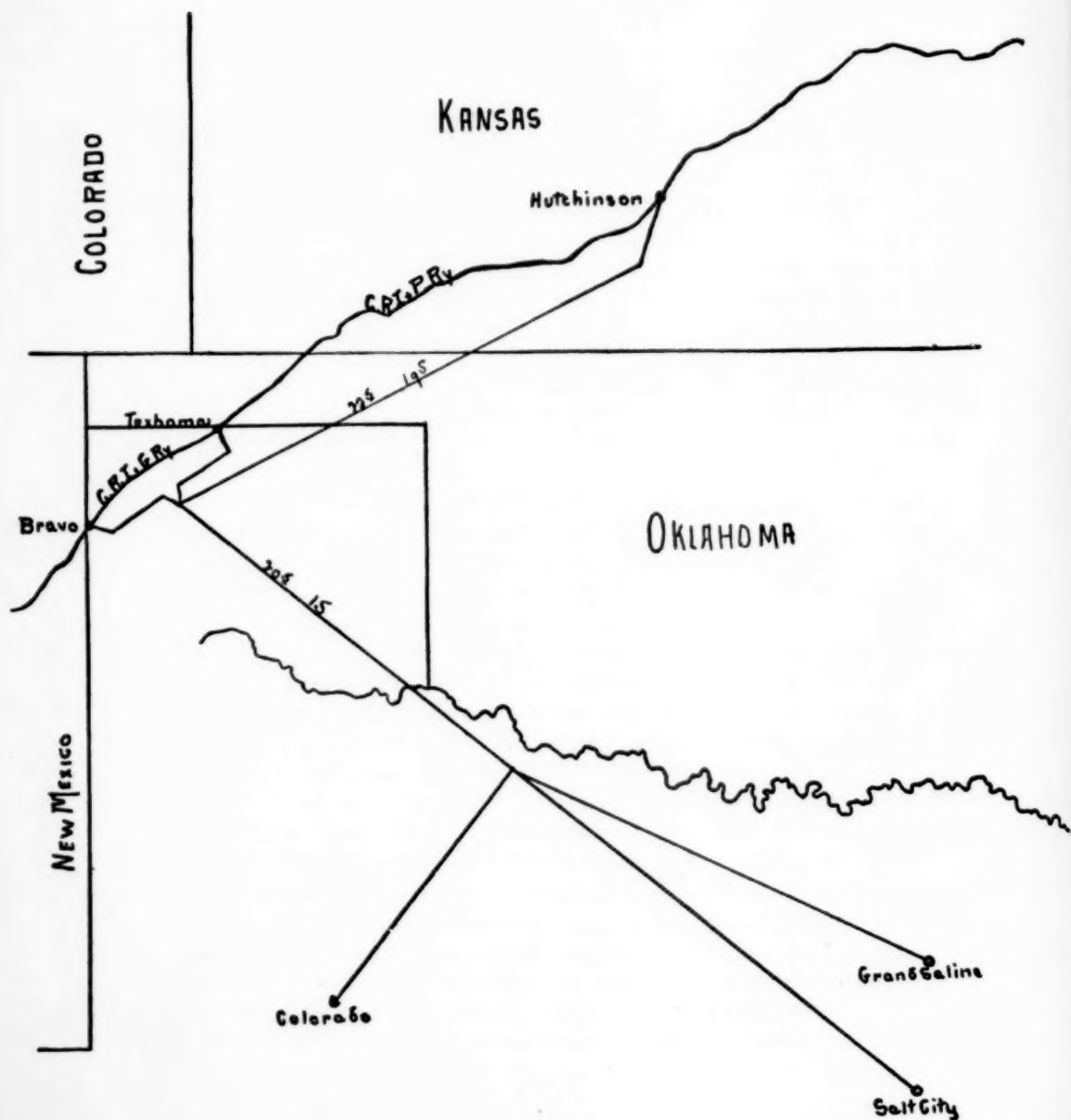
Upper figures; Rates at present in effect.
Lower figures; Rates which would apply following the above mentioned reduction.

ment. The principle has frequently been reviewed without disapproval by the Interstate Commerce Commission. The Texas Commission, however, has taken the opposite view, and in their state classification have fixed Class "A" basis on these commodities when shipped in carload quantities. This action on their part has no force or effect so far as concerns state traffic. None of these commodities are manufactured within the state and no house in the state jobs them in carload quantities. The State Commission's action does, however, reduce the interstate rate on these commodities from New York to interior Texas towns 37 cents per 100 pounds in car-load lots.

That the Texas Commission exercises its rate-making powers with deliberate intent to control the interstate rates for the benefit of its industries appears from the following illustration: The Rock Island has a line running southwest from the State of Kansas, passing diagonally across the Panhandle of Texas into New Mexico and on to El Paso. There are large salt industries on this line at Hutchinson, Kansas, and in the year 1905 the Rock Island, being asked to establish a reasonable rate from Hutchinson into its Panhandle towns, published an average rate of 19½ cents. The average distance is about 300 miles. There are salt plants of considerable importance at Grand Saline, Salt City and Colorado, Texas, and under the State Commission's orders, the Rock Island, in connection with other lines, had in effect an average rate of 20½ cents per 100 pounds from these state salt plants to the Panhandle towns. The average haul to these points is, from Grand Saline, 525 miles; from Colorado, 660; and Salt City, Texas, 690 miles. When the Rock Island's interstate rate came to the attention of the Texas Commission, it ordered the Rock Island's Texas line to non-concur in the reduction, threatening that if the interstate rate were allowed to stay in, they would compel the state carriers to haul salt from these state plants to the Panhandle points for 15 cents per 100 pounds. Needless to say, the interstate rate was withdrawn, and it remains to-day at the Texas maximum rate of 22½ cents. The map illustrates the situation.

Illinois

Recent reductions in class rates in Illinois have forced reductions of the interstate rates between St. Louis, Hannibal, Quincy,



Average Mileage	
From HUTCHINSON	300
- COLORADO	660
- GRAND SALINE	696
- SALT CITY	690

Illustration TEXAS COMMISSION'S emergency rate on SALT

Keokuk, Davenport and Dubuque, and will eventually force similar reductions in rates between intermediate local points either wholly interstate or wholly within other states than Illinois.

Arkansas

The Arkansas Commission has prescribed a full line of class and commodity rates which produce an effect on all the rates on merchandise brought into the state from points beyond, similar to the results of the Texas Commission's regulation of the rates in that state.

Minnesota

The Minnesota Commission has fixed a scale of class rates within the state which recently required the leveling down of all rates from Minneapolis, St. Paul and Duluth in Iowa and Dakota points. It was with respect to this situation that Judge Lochren said in the case before him involving the validity of these rates:

"It would seem to be very difficult to avoid . . . the conclusion that these rates fixed in respect to Minnesota do necessarily and directly affect interstate commerce. . . . I have no doubt that Congress might very properly, under the constitutional provision giving it the entire power of control over interstate commerce, assume control of the avenues of interstate commerce, of the railroads which are engaged in interstate commerce, and of all rates which are collected by those railroads, whether within the states or without the states, because the matter of those rates would affect these avenues of interstate commerce, and might affect their ability to continue as avenues of interstate commerce."

And as to this argument, urged before the Supreme Court in the Minnesota rate case, recently decided, the opinion of Mr. Justice Peckham says:

"Still another Federal question is urged growing out of the assertion that the laws are, by their necessary effect, an interference with and a regulation of interstate commerce, the grounds for which assertion it is not now necessary to enlarge upon. The question is not, at any rate, frivolous."

THE TREND OF GOVERNMENTAL REGULATION OF RAILROADS¹

BY EMORY R. JOHNSON,

Professor of Transportation and Commerce, University of Pennsylvania,
Philadelphia.

In speaking of the trend in the policy of the states and of the national government in the regulation of railroads it is not necessary to go back of 1870. In the early 70's there swept over this country a movement very similar to that which we have witnessed during the last five years: a demand for effective and thorough regulation of the railroads by the states. The legislation that resulted from the agitation was called the "Granger laws," because after the movement had started it was taken up and carried to success by the Patrons of Husbandry, popularly known as the Grangers.

In 1870, the position taken by the public, to some extent, and by the railroad corporations, almost without exception, was that the states did not have the authority to regulate railroad charges. The intensity of the Granger movement in the 70's was largely due to the feeling that it was necessary to prove that the states did have the power to regulate public service corporations. The authority asserted by the states was confirmed by the United States Supreme Court in the Granger decisions of 1876, so that over thirty years ago the principle was firmly established that all transportation rates are subject to legislative control.

Since then it has been a question not of power but of policy. The laws of the 70's, for the regulation of railroads, took three definite forms. One was the enactment of statutory rates—as was done by Iowa in 1874, and by Wisconsin in 1874, when the so-called Potter law was passed. Another method of rate control adopted at that time was the establishing of state commissions with the power to prescribe schedules of rates in some cases; in other instances with the authority only to revise railroad rates, fixed in the first instance by railroads. In some states, notably the eastern, commissions were created with general regulative powers, but without control over rates.

¹An address delivered at the Annual Meeting of the Academy, April 11, 1908.

It so happened that most of the Granger laws were passed during the five or six years of serious business depression which followed the panic of 1873. For that reason it was not difficult for those opposed to the laws to establish the contention that the laws had brought about a serious business condition in the railroad world. I do not think any considerable number of impartial students of economic history would now assert that the Granger laws had very much to do with the embarrassment of the railroads from 1873 to 1879. The railroads, like other forms of business activity, suffered from the conditions of the time. To some extent those laws might have contributed to the unhappy condition of the railroads, but the misfortunes of the railroads in the 70's were due primarily to their overspeculation in the past, and to the general business situation prevailing in this country from 1873 to 1879.

It was but natural, however, that a reaction from the early Granger legislation should take place. Many states that had first fixed railroad rates by statutory law repealed their acts. Some states which had established commissions with power to adjust rates took that function away from their commissions. Other states, like Illinois, maintained their commissions with the rate adjusting power. This was the second phase of the development of railway regulation in this country. It was a tendency toward more conservative legislation, a movement that lasted until about 1890.

Shortly before 1890, a movement for more stringent and thorough regulation of the railroads set in, and all the state commissions established from 1890 to 1906, and there were many of them, were what are called "strong" commissions, those having power not only to supervise railroads, but also to regulate their charges. Thus during the last twenty years we have been adhering to the principles, and to some extent to the practice, of the Granger legislation of the 70's.

This third phase of the government regulation of railroads has culminated in two rather distinct tendencies, one of which is the reenactment by many states, of laws fixing statutory railroad charges. These laws of the last five years have, with the exception of those of nine states, applied only to passenger fares.

The other recent tendency has been the establishment of corporation and public utilities commissions. Six years ago North Carolina and Virginia established corporation commissions, giving

to the same body of men power over banks, railroads and common carriers other than railroads. Last year the State of New York established its Public Utilities Commissions, one for the State of New York and the other for the City of Greater New York. These commissions have power over the charges and services of all public service corporations. The State of Wisconsin has also given its railway commission powers over public service corporations, and other states are debating the question. This movement represents the latest phase of the evolution of state regulation of railroads.

Along with the growth of the power of the states over transportation there has also gone on a development of national regulation of railroads. The federal act of 1887, although amended in detail from time to time, was not greatly changed until 1906, when the so-called Hepburn bill of the 29th of June was passed. That law expressing the mature judgment of the American people, who had given serious thought to the question for at least a decade, established in statutory form two fundamental principles. There were many minor provisions; but the two really important ones were those empowering the Interstate Commerce Commission to require uniform accounting, and to adjust railroad charges.

The Interstate Commission has prescribed uniform accounting, and the books of the railroad companies are now as open to the government as are the books of banking companies. The business of railroading has in a large measure ceased to be private, and has become open and public. This, in my judgment, is the most important provision in the Hepburn act.

The other new power given the Interstate Commerce Commission is the authority, upon complaint and investigation regarding an existing rate, to name a reasonable maximum rate which the carrier shall charge for a particular service. The commission is not given the general rate making function, but merely the power to make an adjustment, and its authority over charges can be exercised only on complaint and after investigation. Its action must be confined to particular rates.

The federal government now requires that interstate railroad rates shall be public, that the service shall be equitably performed and that the books of the railroads shall be open to the Interstate Commerce Commission. The law further stipulates that if, in the

management of that service, unreasonably high or unreasonably discriminatory rates are charged, they shall be adjusted by public authority. This is the present status of national regulation of railroads.

In the simultaneous development of the power of the states and the federal government, the two authorities have come into conflict to some extent, but the conflict of the states and the nation is due mainly to the fact that commerce has changed. The friction between the two authorities is but the natural consequence of the fact that trade and transportation have changed from state to national. It is quite true, as President Mather² has explained, that the states in fixing charges may exercise a very large influence over interstate rates. Every state commissioner and every state legislator ought to read President Mather's paper, because it would aid them in measuring the effects of their actions. If legislators and state commissioners know exactly what effects their laws and decrees produce they may generally be trusted to exercise their power with discretion.

It does not seem wise to go so far at the present time as to take away from the states, if it be possible to do so, by indirection or otherwise, their power over the commerce within their boundaries. We do not need to hasten the evolution of national authority. That will surely expand as fast as will be well for our national institutions. It is better, for the present at least, to conserve to the states in as full a measure as possible the powers they have over commerce.

Most of us will agree, I think, that the state two-cent fare laws were unwise, because not based upon sound principles. While I believe fully in the desirability of federal and state regulation of public service corporations, I am equally certain of the fundamental fact that the regulation of public transportation is an administrative function, and that it is unwise for the states to declare by statute what rates and fares shall be. Economic conditions change, what is reasonable one year may be unreasonable the next year, either in passenger fares or in freight rates. The true adjustment of charges to service can be brought about only by continuous administration, and not by the enactment of rigid statutes. In order to maintain

²Consult the preceding paper on "How the States Make Interstate Rates," by Mr. Robert Mather.

a reasonable relationship between services and charges, one that is just from the public point of view and equitable to the carrier, it is necessary to place in the hands of some competent and responsible commission the power to regulate the services and the rates of railroads.

There are, it is true, many people who believe it is not wise to give to a commission, state or national, the power to say what a railroad charge shall be. This is hardly the place to enter upon a discussion of that large question, and I must content myself with the mere statement that I believe the time has now come when we must accept not only the soundness of the theory, but the desirability of the practice, of investing in some public body the power to say to the carrier that his charge, from the public point of view, is or is not a reasonable one. Moreover, I do not believe that we thereby run into any serious danger.

The American people are conservative. Much is said about our radicalism, about the tendency of our legislators to follow public whims, but candidly is the charge true? Is it not rather the fact that the American people, in their attitude toward capital and labor, are on the whole and in the long run, conservative? Is it not a wiser policy to continue along the line of evolution which we have followed for thirty years, instead of reversing our policy because of the present temporary depression in business? I believe that we shall not turn back, but that we shall go ahead developing the power of the states and of the nation, so that they may bring about, as regards the regulation of transportation services and charges, the fullest measure of equity to carrier, to passenger, and to shipper.

THE NATION AND THE RAILWAYS

BY STUYVESANT FISH,
New York

Our country is pre-eminently the railroad country of the world. For over fifty years we have had more miles of railroad in operation than all Europe. In those well-settled countries the building of railways simply provided a cheaper and better means of handling an existing traffic. For us they have made a wilderness habitable, rendered its settlement and civilization possible, and created the traffic which they now carry. The amount of money invested in our railways exceeds that in any other one thing, except lands and buildings, and more of our people are employed in and about the railways than in any other pursuit except farming.

Our railroads, like those in England, have been built by private corporations, organized for that purpose and never by the government. It is said that the words "*periculum privatum, utilitas publica*" appeared on the seal of the first railway company incorporated in England; and with us, as with them, the risk has ever been private, although the benefit as well as the use has been public.

In the United States the building of railroads began in or just before 1830, at the close of which year there were twenty-three miles in operation. The vastness of our territory, the absence of wagon roads, and the inability of the states and the municipalities to build them, made the construction of railroads a prerequisite to the settlement and civilization of the interior. Liberal and perpetual charters, which often carried exemptions from taxation, were freely granted by all the states. Many of them ran largely into debt, and not a few into bankruptcy, in order to obtain these means of creating and developing commerce in what were then waste places.

In order to induce the investment of private capital in the construction of new railroads, the federal government began, in 1850, to make grants of public lands. Within about twenty years (from September 28, 1850, to March 3, 1871) Congress passed acts granting 159,125,734 acres, or 248,634 square miles, of public lands

for that purpose. This exceeds the present area of all the thirteen original states, excepting only South Carolina and Georgia, and is more than five times that of Pennsylvania. Only a part of these enormous grants became available through the actual construction of the railroads.

The need of transportation became such that during and after the Civil War, the federal government also issued its bonds for many millions of dollars in further aid of building new railroads. In the decade from 1860 to 1870 counties and towns bonded themselves in enormous sums to secure the development of their latent resources by the life-giving touch of the railway. Thus far all legislation, federal, state and municipal, has been in aid of the construction of additional railroads.

Down to 1870 our railroads had been operated as private corporations for gain without much if any regard to the public. The sole question seemed to be the profit to the stockholders. Then began the enactment of the so-called "Granger Laws." This was an effort on the part of the several states, each for itself, to reduce charges and secure better service and accommodations. When some states attempted to regulate rates from points within their borders to points in other states, the Supreme Court of the United States decided that no state had such authority, the constitution having granted to Congress the power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It then became necessary for the federal government to act, which resulted in the creation of the Interstate Commerce Commission under the "Act to regulate commerce," passed in 1887.

The act of 1887 forbade the railroads from pooling freight. This took away what had become perhaps the chief incentive to the building of new railroads, and more than any other thing has tended to concentrate the control of the railroads of the United States in the hands of a few. Down to 1870, and a little later, commerce by land "among the several states" had been absolutely free from governmental control, and, so far as the federal government is concerned, remained absolutely free until 1887. However we may differ about a tariff on imports from abroad, no one will question that free trade among ourselves has resulted in upbuilding the wealth and the strength of this nation.

In 1850 the United States already possessed more miles of railroad than England and France put together, and since about 1860 it has at all times had more than the whole of Europe. The granger legislation does not seem to have checked the building of new railroads. For while to the 30,626 miles in operation in 1860 there had been added in the next ten years (before the passage of the granger laws) 22,296 miles, or 72.8 per cent, there were added in the next ten years to the 52,922 miles in operation in 1870, 40,345 miles, or 76.23 per cent; and to the 93,267 miles in operation in 1880 there were in the next ten years added 73,436 miles, or 78.74 per cent. While I would not have you believe that it is wholly due to the efforts of Congress to regulate commerce, I do want to impress upon you the fact that in the next ten years there were only added to the 166,703 miles in operation in 1890, 27,559 miles, or 16.53 per cent. It may be that in 1890 the country already had enough railroads, but you will find difficulty in persuading citizens of localities not served by railroads to agree to that proposition. It seems to me that the legislation by Congress was not so much addressed to regulating commerce by rail, as to curtailing the profits of the business. However this may be, it certainly deterred the investment of fresh money in such enterprises, and thereby restricted the building of new railroads to those directly or indirectly controlled by the existing systems. With the single exception of a railroad from Kansas City to Sabine Pass, on the Gulf of Mexico, which has in the meanwhile been sold under foreclosure of mortgage, I can recall no considerable railroad which has been completed as a new and independent venture since the passage of the interstate commerce law in 1887.

Let us now see how the nation fared in the forty years from the first census taken in 1790 to the introduction of railroads in 1830, and later contrast its growth without railroads during that period with its growth after their introduction. In that period steam had been widely introduced as an efficient force in manufactures and in the propulsion of vessels. In the latter respect the United States already led every other country in the world in 1830. And yet in those years, or rather from 1800 to 1830, our imports of merchandise had fallen steadily at each decennial period from \$91,252,768 in 1800 to \$62,720,956 in 1830, and our exports of merchandise had not grown appreciably, having been

\$70,971,780 in 1800 and only \$71,670,735 in 1830. Concurrently the tonnage of American vessels built had fallen off nearly one-half, from 106,261 tons in 1800 to 58,560 tons in 1830. So also of the tonnage of American vessels in domestic and foreign trade, which, while increasing from 971,840 tons in 1800 to 1,190,983 tons in 1830, showed in the latter year a marked diminution as compared with 1820, alike as to domestic and foreign trade.

We may fairly say that at the genesis of our railroads, in 1830, neither the wealth nor the commerce of the United States was increasing normally. The census reports give no figures as to wealth for the years prior to 1850, but Mulhall estimates that in 1790 the wealth per capita in the United States was \$157.56, and that in 1830 it had risen to \$205.94, showing an increase in forty years of 30.71 per cent. This without railroads.

In 1870 the wealth per capita had grown to \$779.83, an increase in the forty years from 1830 of 278.67 per cent. Twenty years later, in 1890, under restrictions on railroads by state commissions, but still under absolute free trade between the states, the wealth per capita rose to \$1,038.57, showing an increase of 33.18 per cent. In the next ten years, from 1890 to 1900, under the added restriction of legislation by Congress as to railroads, the wealth per capita grew to \$1,164.79, but the ratio of increase in those ten years was only 12.15 per cent. We here see that the greatest ratio of increase in wealth per capita took place coincidentally with the greatest ratio of increase in railroad mileage under absolute free trade among the states; that the ratio of increase in wealth slackened somewhat in the period of the granger legislation, and more decidedly after Congress began to regulate commerce.

In saying this do not understand me as opposed to governmental regulation of railroads, but only as opposed to the form which it has taken in the United States. In so far as regulation by state commissions is concerned their action has, in the West at least, been hostile and generally narrow and selfish.

The regulation by Congress is to be criticised on other grounds. First, in that it has taken a direction which has resulted in repressing instead of stimulating the building of new railroads. Second, in that Congress, instead of regulating the whole business, has taken but part of it. And, third, in that the Interstate Commerce

Commission is an anomalous body of a character not known to or recognized under the constitution.

I.

I have already spoken of the lessened ratio of increase in miles operated since 1890, previous to which year the Interstate Commerce Commission exerted little if any influence on the business, and also of the effect which the act of 1887 had through forbidding the pooling of freight in taking away an incentive to the building of new railroads.

II.

The constitution provides that Congress shall have power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Acting thereunder Congress had at an early day legislated for the supervision of coasting vessels, and on the introduction of steamboats, in respect to them, even where plying solely on waters wholly within one state. But when Congress took over the supervision of railroads by passing the act of 1887, it expressly excepted from the provisions of that law transportation "wholly within one state." That Congress will eventually have to regulate this as well seems to me inevitable, even though many believe a constitutional amendment necessary to that end.

I am not a lawyer, and candor compels me to say that I have not met one member of that profession who believes as I do, that the power given to Congress to regulate commerce among the states carries with it everything which rises to the dignity of "commerce" as distinguished from "petty trade."¹ The lawyers tell me

¹Since preparing this address I was, yesterday (April 10, 1908), privileged to read an address delivered by the Hon. Charles F. Amidon, Judge of the United States District Court for the District of North Dakota, before the American Bar Association, in Portland, Maine, last August, on "The Nation and the Constitution," from which I quote as follows:

"The severest critic of railroads cannot deny that their policy has been splendidly national, and the most potent single factor in the creation of our vast domestic commerce."

• • • • •
"How far may the national government go in the control of those matters which have become in fact national? The situation fits exactly the terms of the resolution passed in the convention that framed the constitution, and which was the source of all the powers and restrictions embodied in that instrument. It presents a case to which the separate states are incompetent and in which the

that the question has been settled over and over again by the Supreme Court of the United States, beginning with the leading case of *Gibbons v. Ogden*, decided in 1824. I have recently read with some care the arguments in that case, and the opinion of the court by Chief Justice John Marshall, as well as the opinion of Mr. Justice William Johnson, in which the latter, while concurring in the judgment entered in the cause by his five associates, says that he reached the conclusion by different views on the subject. The words in the opinion of the court which are generally quoted are, "The completely internal commerce of a state, then, may be considered as reserved for the state itself." Undoubtedly those words are there, but as we will see shortly, the context of the opinion takes a broader view. The judgment of the court was that commerce covers navigation, including transportation, which service is at present performed by railways in utter disregard of state boundaries. All this seems to me as a layman to render the dictum of the court above quoted no longer literally binding. The court said (9 Wheaton, 187):

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said that they were sovereign, were completely

harmony of the United States may be interrupted by the exercise of individual legislation.' As to railroads there is no more reason why they should be subject to a divided authority than there is in the case of navigation. There will, of course, be in the one case as in the other, local matters that can be best dealt with by local authority. But as to all that affects them as commercial agencies, whether that commerce be local or interstate, the railroad is a unit; its activities are national, and it ought to be subject solely to national authority. Divided control is inefficient in protecting the public and grossly unjust in the burdens which it places upon the carrier. During the last winter there were passed in the states west of the Mississippi River one hundred and seventy-eight statutes dealing directly with transportation and its instrumentalities. The number of such statutes now in force throughout the entire country extends well into the thousands. They are conflicting, oppressive, inefficient. They seldom represent intelligent investigation, but in the main have had their origin in agitation, often in popular frenzy. State legislatures have not yet learned that due process of legislation, like due process of law, proceeds upon inquiry, and legislates only after hearing. Protection to the public and justice to the carrier alike unite in the demand for a single governmental control. The power under the commerce clause of the constitution is plain. The decisions of the Supreme Court have placed that subject beyond the realm of controversy. If the railroad as an instrument of commerce can only be dealt with justly and efficiently by a single authority the federal government may assert and maintain its exclusive jurisdiction. Regulation is now inefficient because divided. If the federal government shall take exclusive control, it will then be responsible alone for such a control as shall be both efficient and just."

independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

(193):

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; *and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."*

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. *It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.*

If this be the admitted meaning of the word, in its application to foreign nations, *it must carry the same meaning throughout the sentence, and remain a unit*, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. *Such a power would be inconvenient, and is certainly unnecessary.*

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those

internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. *The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it.* The deep streams which penetrate our country in every direction pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.

This principle is, if possible, still more clear when applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? *Commerce among the states must, of necessity, be commerce with the states.* In the regulation of trade with the Indian tribes the action of the law, especially when the constitution was made, was chiefly within a state. *The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states.* The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms and do not affect the questions which arise in this case, or which have been discussed at the bar. *If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.* The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the

sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.

The power of Congress, then, comprehends navigation within the limits of every state in the Union; so far as that navigation may be in any manner connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

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The sole question is, can a state regulate commerce with foreign nations and among the states while Congress is regulating it?

The court then went on to show why a state cannot regulate commerce with foreign nations and among the states while Congress is regulating it.

It is the failure of Congress to also take over the internal commerce within one state which makes necessary the continued existence of state commissions. This, to my thinking, has greatly lessened and weakened the good which might have come to the nation, and to the railways as well, from a proper regulation by one central authority of the one thing "commerce among the several states."

Under its constitutional power, "to establish post-offices and post-roads," Congress long since established as post-roads "All railroads, or parts of railroads, which are now, or hereafter may be, in operation." This regardless of whether they cross state lines, or lie and are operated "wholly within one state." (See Revised Statutes, section 3964.)

III.

The chief reason why more has not been accomplished by the Interstate Commerce Commission lies in the fact that the commission, being executive, or administrative, was, under the law of 1887, also given judicial powers, and under the act of 1906 has been given, in addition, the purely legislative power of fixing rates. The commission is greatly weakened and embarrassed by this mingling in its hands of the functions of each of the three branches of government, which the people, in establishing their constitution, so plainly ordained should forever be kept separate.

As if foreseeing what has taken place in our day, Washington, in his Farewell Address, said:

It is important, likewise, that the habits of thinking, in a free country, should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding, in the exercise of the powers of one department, to encroach upon another. *The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism.* A just estimate of that love of power, and proneness to abuse it which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal, against invasions by the others, has been evinced by experiments, ancient and modern; some of them in our own country and under our own eyes. *To preserve them must be as necessary as to institute them.* If, in the opinion of the people, the distribution or modification of the constitutional powers be, in any particular, wrong, let it be corrected by an amendment in the way which the constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.

Do not understand me as suggesting that the intelligent and honorable men who are and have been members of the Interstate Commerce Commission have attempted to usurp power, but only that all the other branches of government, and particularly the courts, look with disfavor upon the exercise by one body of these three functions of government.

Washington's plea to his fellow-countrymen on behalf of the constitution was addressed not only to their patriotism but to their pocketbooks. To guard against the despotic encroachments of one branch of government on the others is to-day our duty and our interest. But what are we as a nation doing in respect to the corporations which carry our domestic commerce by rail? Nearly every state has legislated and is legislating, not for the regulation of the railroads as a whole but selfishly in respect to those within its borders and chiefly in the direction of the curtailment of the profits of the business, and our National Congress is aiming to do the like. Congress has gone so far toward what Washington called creating a despotism as to authorize one body, the Interstate Commerce Commission, to exercise legislative, executive and judicial functions! Not satisfied with this it is seeking to restrict the

hours of labor; to take from the railroad companies (which the law requires to safely conduct their business) the right of selecting their employees, and to lessen among such employees the measure of care which they have heretofore exercised over the safety of the passengers and goods in their charge. What does fining a railroad corporation effect except to lessen the profit of the innocent stockholders and diminish the inducement to build new railroads, or extend and better old ones?

There is in the highest and truest sense "an indissoluble community of interest" between the nation and the railways. The real owners of the latter are our own people and as much entitled to the fostering protection of our laws, federal and state, as are any other individual citizens. That our courts are of this way of thinking is well known. One of the judges of the Supreme Court of the United States, Mr. Justice Brewer, in an opinion rendered a fortnight ago, in the case of *Interstate Commerce Commission v. Chicago and Great Western Railway*, said:

It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. As said in *Int. Com. Com. v. Ala. Mid. R. R. Co.*, 168 U. S. 144, 172, quoting from the opinion of Circuit Judge Jackson, afterwards Mr. Justice Jackson of this court, in *Int. Com. Com. v. B. & O. R. R. Co.*, 43 Fed. Rep. 37, 50:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to a change of rates in the manner provided in the Interstate Commerce Act—*Armour Packing Co. v. The United States*, ante,—and also that in fixing their own rates they may take into account competition with other carriers, provided only that the competition is genuine and not a pretense. (Citing authorities.)

It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent

and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly when rates are changed the carrier making the change must, when properly called upon, be able to give a good reason therefor, but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers.

It is high time that our legislatures, federal and state, should call a halt and consider the real interest of our whole people. That there is much of wrong in railroad management I am free to admit. But now that rebating and other discriminations have been stopped, not at all through the passage of new laws but through the enforcement of old ones, the wrong is no longer to the public, but consists almost entirely of frauds committed by the managers,—presidents and directors,—on the stockholders who have irrevocably dedicated their private means to a public use. Against breaches of trust committed by officers and directors, on their stockholders, the common and the statute laws provide abundant remedies. But in the administration of those laws practices have grown up, which make it almost impossible for the minority to assert and maintain their rights against a majority in power.

As I said here, in Philadelphia, a year ago, in an address before the Wharton School of Finance and Commerce of the University of Pennsylvania, "No railroad fortune was ever made through enhancing rates, oppressing shippers, or withstanding the general tendency of rates to decrease. And what is more, every dishonest railroad fortune has been made, not by oppressing shippers, but through robbing the stockholders. Should you ask why these stockholders have not sued for restitution, I would remind you of the cost and delay of such litigation, and of the fact that if restitution should be made, it would be to the corporation, of which in all probability the same persons would remain in control, as the majority holders and as officers and directors, so that the funds restored would simply revert to their custody and their tender mercy."

It has been shown that the increase in the wealth per capita has grown with the growth of our railroad mileage. The nation and the railways to-day confront a period of depression in which

each needs to husband all its resources. Not long after the Civil War a distinguished Southern Senator, later known as Mr. Justice Lamar of the Supreme Court, in his epoch-making eulogy on Charles Sumner, said, "My countrymen, come to know one another and you will come to love one another." Can we do better than to hope that through discussions such as we are having to-day, the nation and the railways may come "to know one another and to love one another" for the mutual good of both?

FIVE YEARS OF RAILROAD REGULATION BY THE STATES

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In 1902, the Interstate Commerce Commission, in an exhaustive report, tabulated the laws which the state legislatures for twenty years past, had enacted for the control of their common carriers. Since then, five legislative years have passed, and at no other time of equal length in the history of state railroad control, have the commonwealth legislatures enacted more railroad laws than during the last half of this period. In half a decade, over eight hundred separate provisions were enacted to regulate the common carriers engaged in intra-state traffic.

For purposes of analysis, the chief provisions may be classified into six groups: (1) The newly created commissions; (2) Amendments to older commission laws; (3) Freight rate and passenger fare acts; (4) Acts designed to regulate the service of public carriers; (5) Corporate affairs, and (6) Public safety.

(1) *Newly Created Commissions.*—While in 1902 there were thirty-one state¹ railroad commissions, at present there are thirty-nine. As seven of the old commissions,² however, were displaced by bodies vitally different, it is permissible to say that during the last five years fifteen new commissions were created.

For purposes of comparison these newly created commissions may be divided into four groups. First, and most numerous, are those whose rate fixing authority, consists of the power to revise rates as distinct from the power to make complete schedules. The commissions of Wisconsin, Ohio, Colorado, Michigan, Nevada, New York, Oregon, and Vermont, are of this type. In these states, the work of making the complete schedule of rates for the intra-state traffic

¹Including Virginia Corporation Commission, created by constitution in 1902, but not appointed until 1903.

²The commissions of Wisconsin, Ohio, Colorado and Michigan consisted of but one commissioner; those of New York, Alabama and Vermont were displaced by new commissions.

remains in the hands of the railroad traffic agents. If, however, a shipper, an agricultural, trade or manufacturing organization, a municipality or other corporation, as designated in the various statutes, makes a complaint to the commission that a particular rate or specified rates are unjustly high or discriminatory, the commission investigates the matter, calls witnesses, has experts examine the railroad's accounts and holds formal hearings. If it finds the complaint well-founded, it orders the railroad to substitute, for the particular rate complained of, rates which the commission considers reasonable. Commissions of this type may issue mandatory orders² only upon complaint, and after hearings have been held, they may investigate any rate upon their own initiative, but in that case may merely recommend. Their duty is not to make schedule of rates, but to correct whatever flaws may be found on the schedules as made by the railroads.

TABLE I.
ORGANIZATION AND SCOPE OF THE COMMISSIONS

STATE.	Year.	How chosen.	Term years	No.	Power to fix rates.	Classification.	Joint rates.	Express cars.	Private cars.	Industrial R. R.
Indiana	1905	App.	4	3	Yes	Yes	Yes	Yes	Yes	.....
Washington ..	1905	App.	6	3	Yes	Yes	Yes	Yes	Yes	.....
Wisconsin.....	1905	App.	6	3	Yes	Yes	Yes	Yes	Yes	Yes
Ohio	1906	App.	6	3	Yes	Yes	Yes	Yes	Yes	Yes
Colorado.....	1907	Elec.	6	3	Yes	Yes	Yes	Yes	Yes	Yes
Michigan	1907	App.	6	3	Yes	Yes	Yes	Yes	Yes	Yes
Montana.....	1907	Elec.	4	3	Yes	Yes	Yes	Yes	Yes	.....
Nebraska.....	1907	Elec.	6	3	Yes	Yes	Yes	Yes	Yes	.....
Nevada.....	1907	App.	3	3	Yes	Yes	Yes	Yes	Yes	Yes
New York.....	1907	App.	5	5 & 5	Yes	Yes	Yes	Yes	Yes	Yes
Oregon.....	1907	Elec.	4	3	Yes	Yes	Yes	Yes	Yes	Yes
New Jersey....	1907	App.	6	3	No	No	No	.....	.....	.....
Pennsylvania ..	1907	App.	5	3	No	No	No	Yes	Yes	.....
Alabama.....	1907	Elec.	4	3	Yes	Yes	Yes	Yes	Yes	Yes
Vermont.....	1907	App.	6	3	Yes	.....	.....	Yes	Yes	Yes

The second type of the newly created commissions includes those which have the power to make complete rate schedules for all purely state traffic. Washington, Indiana, Montana, Nebraska and Alabama have granted this power to their respective commissions and made it their duty. In making the initial rate schedules these commissions exercise far more drastic powers than those of the first type, for they act upon their own initiative and make schedules instead of corrections. After their schedules are inaugurated,

²Wisconsin commission may investigate, call hearings and issue orders upon its own motion.

complaints may be brought as in the case of the commissions which merely revise rates, and the railroads may likewise make complaints. The order of procedure is then similar to that above explained, with the one marked difference *i. e.*, the complaint in the eight states of the first type is usually against rates made by the railroad freight agent, while in these states, it is against rates made by the commission.

The third type consists of the so-called "weak commissions,"—those which do not have the power to fix rates. In 1902, ten, or one-third of the state commissions were still of this character, but of the fifteen newly created commissions, but two, those of Pennsylvania and New Jersey, are "weak." The Pennsylvania commission investigates rates, makes its findings public and recommends certain charges to the carriers. If its recommendations are not voluntarily accepted, the commission has no mandatory power; it brings the matter before the Secretary of Internal Affairs, and the Attorney General, "for their action according to law, as the public interests may require, and reports the same in detail in its next succeeding report to the governor."⁴ The New Jersey Commission of 1907,⁵ likewise, can merely investigate and recommend as regards rates and the other important matters of railroad operation; it can issue orders only as regards the safety of tracks, roadbeds, tunnels, bridges and equipment, and the adequacy of transportation facilities and stations.

The last group of commissions forms a distinct type, not because of their rate-making power, but, because of the scope of their jurisdiction. They are "Public Utility Commissions," and include those of New York and Wisconsin.⁶ In addition to the usual common carriers, controlled by railroad commissions, the New York Public Service Commission has jurisdiction over all street railways, and over the manufacture, sale and distribution of gas and electricity for light, heat and power.⁷ The state is divided into two districts and in each there is a public utility commission consisting of five members. The Wisconsin Railroad Commission, was in 1907, given jurisdiction over an even wider range of public utilities. In addition to common carriers, street car and telegraph companies, tele-

⁴Pennsylvania, Act of May, 1907, No. 250, Sec. 17.

⁵New Jersey, Laws of 1907, Ch. 197.

⁶Wisconsin Railroad Commission (1905) obtained charge of public utilities in 1907, Sec. 1797, M 1 to 108.

⁷Laws of New York, Ch. 429.

phone companies and light, heat, water and power plants were placed within its jurisdiction.

In the four types of commissions here distinguished, there are certain *common powers and tendencies* clearly discernable. The powers of greatest importance are those with respect to *rates*. There is a decided tendency in the direction of granting to the commissions the authority to make rates, thirteen of the new commissions being armed with rate-making powers. The particular form of this rate-making power manifests a tendency toward rate revision as contrasted with the making of schedules, eight of the commissions having the former, and five the latter authority. The tendency, moreover, is toward the fixing of absolute rates, but two of the commissions, those of Montana and New York, being definitely limited to the making of maximum rates.⁸ Lastly, the tendency in rate-fixing, is to make it all inclusive. Twelve of the thirteen mandatory commission laws expressly include the power to fix joint rates and classifications.⁹

A second marked tendency is to give to the commissions wide *administrative powers over the service* of common carriers. Each of the fifteen recently created commissions is entrusted with the important duty of supervising the distribution of cars, and all but the Pennsylvania commission may issue mandatory orders to provide for reasonable distribution. Train service, stations and terminals, and, as is stated in the typical Wisconsin statute, "any regulation or practice, whatsoever, affecting the transportation of persons or property" are controlled by the commissions in the same way as are rates.

A third group of powers generally vested in the new commissions is the control¹⁰ of matters pertaining to *public safety*. They supervise the trackage and roadbed, grade crossings, signals, interlocking plants and all other safety devices, and issue orders, when necessary for the safety of the public or the railway employees.

The fourth tendency is to grant *financial powers* to the commissions. In New York, Wisconsin, Washington and Oregon, the commissions have the power to prescribe a system of uniform accounts, with the injunction in the New York statute, that it "shall conform as near as may be to those from time to time,

⁸Laws of Montana, 1907, Sec. 13; Laws of New York, Ch. 429.

⁹See Table I.

¹⁰Not mandatory in Pennsylvania.

established and prescribed by the Interstate Commerce Commission."¹¹ In New York, Oregon and Vermont, the commissions have control over the issue of stocks and bonds. All of them have the power to investigate the financial condition of all carriers within their jurisdiction.

The *judicial and executive powers* of the new commissions consist chiefly of the power¹² to try cases, hear and investigate complaints, summon and examine witnesses, issue subpoenas, administer oaths, require the production of books and papers, take depositions, "make findings, decisions or recommendations, determine their own procedure, and use a seal."

In the sixth place, there is a marked tendency to increase and concretely define the *extent of the commission's jurisdiction*. As was true of the older commissions, all the newer statutes grant to them the control over common carriers. But the recent¹³ statutes stipulate what is included under the term "common carrier." Fourteen of the fifteen laws definitely include express companies;¹⁴ thirteen especially stipulate private car companies and fast freight lines; and nine make special mention of industrial railroads. In twelve of the new commission laws, special mention is made of inter-urban street railways;¹⁵ and in Indiana, Nebraska, New York, Wisconsin and Pennsylvania, their jurisdiction extends to street railways¹⁶ operating within cities. The Pennsylvania Commission, furthermore, has jurisdiction over navigation companies, pipe lines, and telegraph and telephone companies.

In New York and Wisconsin, this tendency is carried to the extent of giving the commissions charge of most public utilities. The Georgia commission was, in 1907, reorganized so as to approach closely the scope of a public utilities commission, and similar attempts, in 1908, were made in Ohio and New Jersey. Shortly before the beginning of the five years here under consideration, this tendency was given its start in the "Corporation Commissions"^{16a} of Virginia and North Carolina.

¹¹Laws of New York (1907), Ch. 429, Sec. 52.

¹²Proceedings of Eighteenth Annual Convention of National Association of Railway Commissioners, p. 157.

¹³The New Jersey Statute, 1907, Ch. 197, is indefinite in this respect.

¹⁴See Table I.

¹⁵In all but Washington, Montana and New Jersey.

¹⁶Vermont statute extends to "all railroads within this state, whether operated by steam, electricity, or any other power."

^{16a}The Oklahoma constitution provides for a corporation commission, but it is not yet created.

Lastly, there are definite tendencies in the organization of the new commissions. The movement is away from the single commissioner to a commission of three or more. Fourteen of the commissions consist of three members, and New York's statute provides for two commissions, each consisting of five members. The movement is also toward a long tenure of office,¹⁷ eight of the statutes providing for a six-year term, two for five years, four prescribe a four-year term, and but one clings to a term of three years. Contrary to what the tendency was in 1902, ten of the new commissions are appointive and five elective.

In all, the new commission statutes there are provisions designed to make effective the work of the commissions. A penalty ranging from a maximum of not over \$500 for each offense in Washington and Montana, to one of from \$100 to \$10,000, for each offense assessable against the railroad and its agents and employees in Wisconsin, Ohio, Nevada and Oregon is provided for in case an order of the commission is violated. In Michigan the penalty is \$500 per week; in New York it is not over \$5,000 per day. Eleven of the commission statutes compel the carriers to publish their rates and file them with the commissions;¹⁸ eight expressly state that none but published rates are lawful; and eleven provide that no rate may be changed without a notice of from ten to thirty days. Twelve provide for stringent penalties against unjust discriminations and secret rebates. All the statutes creating "strong" commissions have provisions with reference to court appeals: Ten¹⁹ of them provide that in case of appeal, the orders of the commission shall be *prima facie* reasonable, and that the burden of proof shall be upon the carrier; all the laws except that of New York, provide for a notice and hearings before their orders are suspended by injunction; the Colorado law specifies that the commission's order may not be temporarily suspended for more than ninety days; in Montana and Nevada, the commission's orders remain in force during the court appeal; in Alabama, Oregon, Washington and Indiana, a bond must be posted by the carrier before an order may be suspended so as to test its validity in a court; and in New York, the carriers may appeal to the courts only on the constitutional grounds of confiscation of property without due process of law.

¹⁷See Table I.

¹⁸See Table I.

¹⁹Indiana, Washington, Wisconsin, Ohio, Michigan, Montana, Nebraska, Nevada, Oregon, Alabama.

(2) *Amendments to Older Commission Laws.*—In addition to the creation of new commissions, many changes were made in the powers, duties and organization of commissions which had been previously established. Contrary to the tendency toward the appointive commission, above noted, two of the older commissions, those of Kansas²⁰ and Georgia, were changed from the appointive to the elective type, and in the case of the former, the term of office was reduced from three to two years. In other respects, however, the amendments have been largely in conformity with established movements.

The term of office in Iowa²¹ was increased from three to four years, the salaries of the commissioners in Massachusetts²² and Kentucky were advanced, and the Georgia commission was enlarged to a membership of five. In five states the scope²³ of the commissions was increased. Steamships were brought within the Massachusetts statute; express companies within that of Iowa; sleeping car companies within that of Arkansas; electric railways, express and sleeping car companies were brought within the jurisdiction of the Kansas commission, and pipe lines within that of the Louisiana commission.

The Georgia commission was changed into a public utilities commission, when it was given jurisdiction over street railways, telegraph and telephone companies operating beyond the limits of a city, town or country, over public docks and wharves, terminals and terminal stations, public gas light and electric light and power companies.

The Texas, Maine and Kansas commissions were given control over sidetracks,²⁴ and spurs; those of Virginia and North Carolina, over demurrage and car service;²⁵ Georgia²⁶ over the forwarding of freight; Missouri,²⁷ over train service; and North Carolina, South Carolina and Kansas over stations.²⁸ Many commissions were

²⁰Kansas, 1903, C. 391; Georgia, 1906, p. 100.

²¹Iowa, 1906, C. 38.

²²Massachusetts, 1906, C. 417, from \$5,000 to \$6,000; Kentucky, 1906, C. 85, from \$2,000 to \$3,000 and \$3,600.

²³Massachusetts, 1903, C. 173; Iowa, 1907; Arkansas, 1907, Act 193; Kansas, 1907; Louisiana, 1906, No. 36.

²⁴Texas, 1903, C. 99; Maine, 1907; Kansas, 1905, C. 351.

²⁵Virginia, 1903, C. 260; North Carolina, 1903, C. 342.

²⁶Georgia, 1905, p. 120.

²⁷Missouri, 1905, p. 104, 108.

²⁸North Carolina, 1903, C. 126; South Carolina, 1906, C. 8; Kansas, 1907, C. 267.

given control over public safety devices,²⁹ and in four³⁰ states laws were passed obliging carriers to report all accidents to the commissions. The Alabama and Missouri commissions³¹ were, in 1903, changed from the "weak" to the "strong" type. The Iowa and Arkansas commissions were given the power to fix joint rates. The Virginia³² commission was, in 1906, burdened with the duty of making a schedule of passenger fares; and in 1907 the South Dakota commission³³ was instructed to determine the value of the intrastate railroads with a view to making a rate schedule.

Finally, three of the older commissions were given greater financial powers. The New Hampshire³⁴ commission was given the same control over the stocks of a holding company as it previously had over railroad stock issues; the Georgia^{34a} commission was given control over the issue of stocks and bonds; and the Minnesota³⁵ commission was given the highly important power of fixing a uniform system of accounts.

(3) *Freight Rate and Passenger Fare Acts.*—There is a well-defined difference in railroad legislation, between regulation through a commission and regulation by statute. Many statutes, enacted during the last five years were intended primarily as aids to the commissions, and in statutes of this type there is nothing anomalous. As is indicated in the accompanying table, seventeen states enacted laws prohibiting unjust discriminations and rebates. Those passed since the enactment of the Elkin's Law of 1903, and the Interstate Commerce Act of 1906, are modeled after the Federal statutes, and usually provide that the penalty is assessable with equal force against the shipper who accepts a rebate and the carrier who pays it. Ten states, likewise, passed statutes, doubtless based upon the federal acts, providing that only the published rates are lawful. A conviction of rebating in these states, therefore, does not necessitate the comparison of rates paid by competing shippers, but merely evidence that the actual rate paid was different from the published

²⁹New Hampshire, 1903, C. 88; Minnesota, 1905, C. 176, 1907; Massachusetts, 1906, C. 417; Illinois, 1905, C. 350.

³⁰South Carolina, C. 419; Minnesota, 1905, C. 122; Iowa, 1905, C. 131; North Dakota, 1907, C. 205.

³¹Alabama, 1903, p. 95; Missouri, 1903, p. 132.

³²Virginia, 1906, C. 256.

³³South Dakota, 1907, C. 213.

³⁴New Hampshire, 1903, C. 55.

^{34a}Georgia, 1907, No. 223.

³⁵Minnesota, 1907.

rate. Similarly, provision was made in a dozen states that no rate may be changed without notice of a specified number of days—ten days in eight states and thirty days in four.

A similar group of statutes consists of the so-called anti-pass laws. Fourteen states, Alabama, Iowa, Kansas, Minnesota, Michigan, Nebraska, Oregon, Texas, Vermont, Ohio, Indiana, South Dakota, Oklahoma and New York, enacted provisions much like those in the Hepburn Act, prohibiting the granting of all passes, except to railway officials, agents, employees and their families and certain other persons specifically excepted. Six states, Georgia, Wisconsin, New Hampshire, South Carolina, Nevada and West Virginia, prohibited the giving of passes to certain public officials, or members of the judiciary, in order to eliminate bribery, and Texas and Iowa enacted similar anti-pass provisions before the adoption of the more sweeping statutes. New Jersey, in 1907, attempted to accomplish this same end by compelling the railways to grant free transportation to a large number of public officials, and a similar provision, embodied in a constitutional amendment, was submitted to the voters of Missouri, but was rejected.

Rate statutes of this type are but complementary to the control of rates through a commission. In many states, however, the legislatures fixed maximum freight rates and passenger fares by statute, and thereby violated the saner principle of rate control through expert commissions, which they apparently accepted when they vested such commissions with rate-making powers. It is a curious fact that, side by side with the creation of fifteen new commissions and the granting of increased powers to many of the older commissioners, twenty-two states, during the last five years, enacted statutes fixing the maximum *passenger fare* which may be charged between points within their boundaries.³⁶ Eleven³⁷ state legislatures fixed the arbitrary maximum fare of two cents per mile; the statutory maximum in Iowa and Michigan is graded from two to three cents; that of Virginia, from two to three and one-half cents; that of Alabama and North Dakota is fixed at two and one-half cents; North Carolina, at two and one-quarter; and that of Kansas, Montana, South Carolina and Washington, at three cents per mile.

³⁶See Table II.

³⁷The Missouri and Mississippi two-cent fare not applicable to very small roads.

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TABLE

STATE.	Maximum Freight Rates. ¹	Unjust Discriminations.	Rebates.	Notice Before Rate Changes (days).	Published Rates Alone Lawful.	Maximum Passenger Fares (cents). ²	Mileage Books
Alabama.....	1907, No. 154	1907, No. 69	1907, No. 69	10	1907, No. 69	.02½†	1907, No. 6
Arkansas.....	.....	1907, No. 193	.....	.....	.....	.02	.....
California.....	.....	.....	.....	.....	.....	.....	.....
Colorado.....	.....	1907, c. 208	1907, c. 208	30	.....	.....	.....
Florida.....	.....	1907, c. 5621	1907, c. 5621	.....	.....	.....	.....
Georgia.....	.....	.....	.....	.....	.....	.....	.....
Illinois.....	.....	.....	.....	.....	.....	.02	.....
Indiana.....	.....	1905, c. 53	1905, c. 53 1907, c. 241	10	1907, c. 241	.02	.....
Iowa.....	.....	.....	.....	.....	.....	.02-.03	.....
Kansas.....	1905, c. 353 1907, c. 278	.....	.....	.....	.....	.03	1907, c. 272
Maine.....	.....	.....	.....	.....	.....	.....	.....
Massachusetts..	.....	.....	.....	.....	.....	.....	.....
Michigan.....	.....	1907, No. 312	1907, No. 312	10	1907, No. 312	.02-.03	.....
Minnesota.....	1907, c. 232	1905, c. 177	1905, c. 177	.....	.....	.02	1905, c. 221
Missouri.....	1905, p. 102 1907, No. 28 1907, No. 469, 289	.....	.....	.....	.....	.02*	.....
Montana.....	.....	1907, c. 37	1907, c. 37	.....	.....	.03	.....
Nebraska.....	1907, c. 95	1907, c. 90	1907, c. 90	10	1907, Sec. 8	.02	1907, c. 94
Nevada.....	1907, c. 44	1907, c. 44	1907, c. 44	30	1907, c. 44	.....	.....
New Jersey....	.....	.....	.....	.....	.....	.....	.....
New York.....	.....	1907, c. 429	1907, c. 429	30	1907, c. 429	.....	.....
North Carolina.	1907, c. 217	1903, c. 590 1907, c. 217	1907, c. 217	.....	.....	.02½*	1907, c. 216
North Dakota..	1903, c. 146 1907, c. 51	.....	.....	.....	.....	.02½*	1907, c. 199

TABLE II.—STATE RAILROAD STATUTES OTHER THAN THOSE CREATING COMMISSIONS* (1903-1907).

Mileage Books. ²	Anti-Pass Laws. ⁴	Car Service. ⁵	Stations and Terminals. ⁶	Train Service and Connections. ⁷	Livestock Service. ⁸	Industrial Tracks. ⁹	Grade Crossings. ¹⁰	Limited Hours. ¹¹	
1907, No. 69	1907, No. 69	1907, No. 69	1907, No. 69	.....	1907, No. 69	1907, No. 69	1907, No. 69	.....	1903
.....	.....	1907, No. 193	1905, c. 194 1907, No. 148	1907, No. 149, 338	.....	.....	1905, c. 36	1907, No. 282	1907
.....	.....	.....	.....	1905, c. 423	1905, c. 512	1905, c. 548	1905, c. 124	.....	1905
.....	.....	1907, c. 208	.....	.....	.....	1907, c. 208	.....	.....	1903
.....	.....	1903, c. 108	.....	.....	1905, c. 51	1903, c. 109	1903, c. 111	.....	1903
.....	1904, p. 72	1905, Sec. 2 1907, No. 219	1903, p. 36 1906, p. 101	.....	.....	.....	.....	.....	1905
.....	.....	.....	.....	.....	.....	.....	1906, 1907, c. 211	.....	1905
.....	1903, c. 59 1907, c. 241	1907, c. 241, 231	1907, c. 241	1903, c. 22 1907, c. 241	.....	1907, c. 241	1903, c. 59 1907, c. 241	1907, c. 131	1903 1907
.....	1906, c. 90 1907, c. 112	.....	.....	.....	1904, c. 76 1907, c. 115	.....	.....	1907, c. 103	1907
1907, c. 272	1907, c. 273	1905, c. 345 1907, c. 275, 279	1907, c. 286	.....	1904, c. 76 1905, c. 354, 346 1907, c. 276, 279	1905, c. 350	1903, c. 488	1905, c. 342 1907, c. 280	.....
.....	.....	.....	.....	1905, c. 127	.....	1905, c. 127 1907, c. 92	1905, c. 94	.....	1903
.....	.....	.....	1904, c. 357	.....	.....	.....	1905, c. 128, 408	.....	1906 1906 1907
.....	1907, No. 312	1907, No. 312	.....	1907, No. 312	.....	1907, No. 312	1905, No. 127 1907, No. 312	.....	1907
1905, c. 221	1907, c. 449	1903, c. 320 1907, c. 23	1903, c. 147 1905, c. 208 1907, c. 54	1905, c. 287 1907, c. 27	1907, c. 333	.....	1905, c. 280	1907, c. 253	1903 1905 1905 1907
.....	.....	1905, p. 109 1907, Sec. 1075 1907, No. 320	1903, Sec. 1164-5 1905, p. 107 1907, No. 438	1905, p. 10 1907, No. 282	1907, No. 149	.....	1905, p. 106	1905, p. 112	1907 1907
.....	.....	1907 c. 37	1905, c. 26 1907, c. 182	1903, c. 65 1907, c. 37	1907, c. 59	.....	1903, c. 8 1907, c. 43	1907, c. 5	1903 1905 1907
1907, c. 94	1907, c. 93	1905, c. 105	1905, c. 108 1907, c. 8	.....	1905, c. 106, 107, 5	1905, c. 105 1907, c. 89	.....	.....	1907
.....	1907, c. 44	1907, c. 44	1907, c. 44	1907, c. 44	.....	1907, c. 44	1907, c. 44	.....	1907
.....	.....	1907, c. 197	1907, c. 197	1907, c. 197	.....	.....	1903, c. 257 1904, c. 209 1906, c. 301	.....	1907
.....	1907, c. 429	1907, c. 429	1907, c. 429	1907, c. 429	.....	1907, c. 429	1906, c. 109 1907, c. 429, 578	1907, c. 523, 627	1906 1907
1907, c. 216	.....	1903, c. 342 1905, c. 545 1907, Sec. 3 1907, c. 2632	1903, c. 126 1907, c. 210, 465	1903, c. 444, 693	.....	.....	.....	1907, c. 456	1903 1903 1907
1907, c. 199	.....	1903, c. 145 1907, c. 200	1903, c. 147 1907, c. 210	1905, c. 152 1907, c. 201	1903, c. 144 1907, c. 209	.....	1903, c. 148, 301, 548 1905, c. 150	1907, c. 207	1907
.....	1906, c. 244	.....	1906, c. 244	.....	.....	.....	.....	.....	.....

TABLE II.—STATE RAILROAD STATUTES OTHER THAN THOSE CREATING COMMISSIONS* (1903-1907).

Time Before the Changes (days).	Published Rates Alone Lawful.	Maximum Passenger Fares (cents). ²	Mileage Books. ³	Anti-Pass Laws. ⁴	Car Service. ⁵	Stations and Terminals. ⁶	Train Service and Connections. ⁷	Livestock Service. ⁸	Industrial Tracks.
10	1907, No. 69	.02½	1907, No. 69	1907, No. 69	1907, No. 69	1907, No. 69	.....	1907, No. 69	1907, No. 69
		.02	.....	.....	1907, No. 193	1905, c. 194 1907, No. 148	1907, No. 149, 338	.....	.....
							1905, c. 423	1905, c. 512	1905, c. 548
30					1907, c. 208	.....	.....	.....	1907, c. 208
					1903, c. 108	.....	.....	1905, c. 51	1903, c. 109
				1904, p. 72	1905, Sec. 2 1907, No. 219	1903, p. 36 1906, p. 101	.....	.....	.....
		.02					.....	.....	.....
10	1907, c. 241	.02	.....	1903, c. 59 1907, c. 241	1907, c. 241, 231	1907, c. 241	1903, c. 22 1907, c. 241	.....	1907, c. 241
		.02-.03	.....	1906, c. 90 1907, c. 112	.....	.....	.....	1904, c. 76 1907, c. 115	.....
		.03	1907, c. 273	1907, c. 273	1905, c. 345 1907, c. 275, 279	1907, c. 286	.....	1904, c. 76 1905, c. 354, 346 1907, c. 276, 279	1905, c. 350
							1905, c. 127	.....	1905, c. 127 1907, c. 92
						1904, c. 357	.....	.....	.....
10	1907, No. 312	.02-.03	.....	1907, No. 312	1907, No. 312	.....	1907, No. 312	.....	1907, No. 312
		.02	1905, c. 221	1907, c. 449	1903, c. 320 1907, c. 23	1903, c. 147 1905, c. 208 1907, c. 54	1905, c. 287 1907, c. 27	1907, c. 333	.....
		.02*	.....		1905, p. 109 1907, Sec. 1075 1907, No. 320	1903, Sec. 1164-5 1905, p. 107 1907, No. 438	1905, p. 10 1907, No. 282	1907, No. 149	.....
		.03	.....		1907, c. 37	1905, c. 26 1907, c. 182	1903, c. 65 1907, c. 37	1907, c. 59	.....
10	1907, Sec. 8	.02	1907, c. 94	1907, c. 93	1905, c. 105	1905, c. 108 1907, c. 8	.....	1905, c. 106, 107, 5	1905, c. 105 1907, c. 89
30	1907, c. 44	.....	.....	1907, c. 44	1907, c. 44	1907, c. 44	1907, c. 44	.....	1907, c. 44
					1907, c. 197	1907, c. 197	1907, c. 197	.....	.....
30	1907, c. 429	.....	.....	1907, c. 429	1907, c. 429	1907, c. 429	1907, c. 429	.....	1907, c. 429
		.02½*	1907, c. 216	.....	1903, c. 342 1905, c. 545 1907, Sec. 3 1907, c. 2632	1903, c. 126 1907, c. 210, 465	1903, c. 444, 693	.....	.....
		.02½*	1907, c. 199	.....	1903, c. 145 1907, c. 200	1903, c. 147 1907, c. 210	1905, c. 152 1907, c. 201	1903, c. 144 1907, c. 209	.....
10	1906, c. 244	.02	.....	1906, c. 244	.....	1906, c. 244	.....	.....	1906, c. 244

Industrial Tracks. ⁹	Grade Crossings. ¹⁰	Limited Hours. ¹¹	Public Safety. ¹²	Express Service. ¹³	Corporate Affairs. ¹⁴
1907, No. 69	1907, No. 69	.....	1903, p. 162	1907, No. 69	.....
.....	1905, c. 36	1907, No. 282	1907, No. 402	1905, c. 250	1905, c. 163, 268 1907, No. 89
1905, c. 548	1905, c. 124	.....	1905, c. 573, 494, 495, 496	.....	1903, c. 204, 45 1905, c. 425, 423 1907.
1907, c. 208	.....	.....	1903, c. 98, 154, 133	1907, c. 208	1905, c. 129
1903, c. 109	1903, c. 111	.....	1903, c. 109	1905, c. 50	1905, c. 224
.....	.....	.....	1905, p. 86	.....	.....
.....	1906, 1907, c. 211	.....	1905, p. 349, 350	.....	1903, c. 290
1907, c. 241	1903, c. 59 1907, c. 241	1907, c. 131	1903, c. 120 1907, c. 118, 241	1905, c. 53	1903, c. 119, 121
.....	.....	1907, c. 103	1907, c. 110	1907, c. 116	.....
1905, c. 350	1903, c. 488	1905, c. 342 1907, c. 280	.....	.....	1903, c. 392 1905, c. 344
1905, c. 127 1907, c. 92	1905, c. 94	.....	1903, c. 17	.....	1903, c. 23, 93 1903, c. 146
.....	1905, c. 128, 408	.....	1906, p. 75 1906, p. 267, 283 1907, c. 392	1906, c. 266	1903, c. 126 1904, c. 169 1906, c. 463 1907, c. 585
1907, No. 312	1905, No. 127 1907, No. 312	.....	1907, No. 234, 312	1907, No. 312	1905, c. 156
.....	1905, c. 280	1907, c. 253	1903, c. 262 1905, c. 122 1905, c. 280 1907, c. 202, 276	.....	1903, c. 86 1907, c. 395
.....	1905, p. 106	1905, p. 112	1907, No. 152 1907, No. 131	.....	1903, c. 130, 129 1903, c. 126,
.....	1903, c. 8 1907, c. 43	1907, c. 5	1903, c. 101 1905, c. 24 1907, c. 37	1907, c. 37	.....
1905, c. 105 1907, c. 89	.....	.....	1907, c. 90	1907, c. 90	1903, c. 28 1905, c. 40
1907, c. 44	1907, c. 44	.....	1907, c. 44	1907, c. 44	1905, c. 93, 144, 146
.....	1903, c. 257 1904, c. 209 1906, c. 301	.....	1907, c. 197	.....	1903, c. 257 1906, c. 141
1907, c. 429	1906, c. 109 1907, c. 429, 578	1907, c. 523, 627	1906, c. 380 1907, c. 429	1907, c. 429	1903, c. 515 1904, c. 228 1905, c. 727 1907, c. 429
.....	.....	1907, c. 456	1903, c. 552 1905, c. 335 1907, c. 330	.....	1905, c. 187 1907, c. 466, 472
.....	1903, c. 148, 301, 548 1905, c. 150	1907, c. 207	1907, c. 205	.....	1907, c. 53
1905, c. 244	1904, p. 537	.....	1904, p. 615	1906, c. 244	1904, p. 570

Missouri	1905, p. 102 1907, No. 28 1907, No. 469, 289				
Montana.....		1907, c. 37	1907, c. 37		
Nebraska.....	1907, c. 95	1907, c. 90	1907, c. 90	10	1907, Sec. 8
Nevada.....	1907, c. 44	1907, c. 44	1907, c. 44	30	1907, c. 44
New Jersey....					
New York.....		1907, c. 429	1907, c. 429	30	1907, c. 429
North Carolina.	1907, c. 217	1903, c. 590 1907, c. 217	1907, c. 217		
North Dakota..	1903, c. 146 1907, c. 51				
Ohio.....		1906, c. 244	1906, c. 244	10	1906, c. 244
Oregon.....		1907, c. 53	1907, c. 53	10	1907, c. 53
Pennsylvania ..					
South Carolina.	1903, c. 51				1903, c. 51
South Dakota..					
Tennessee.....		1907, No. 690	1907, No. 690		
Texas.....					
Vermont.....		1906, No. 122, 118	1906, No. 126, 121	30	
Virginia.....		1904, c. III.	1904, c. III.		1904, c. III.
Washington....		1907, c. 81	1907, c. 81	10	
Wisconsin.....		1905, c. 362	1905, c. 362	10	1905, c. 362

*Citations are as follows: c., chapter; No., number of bill; p., page, Sec., section.

†For all but small railroads.

¹Maryland, 1906, c. 472½.

²Oklahoma, 2 cents in Constitution; West Virginia, 2 cents.

³Maryland, 1906, c. 174.

⁴Oklahoma in Constitution; West Virginia, 1903, c. 23; New Hampshire, 1907, c. 79.

⁵Oklahoma, 1905, c. 10 article 2.

1906, c. 244	1904, p. 537	1904, p. 615	1906, c. 244	1904, p. 579					
	.02*			1905, p. 109 1907, Sec. 1075 1907, No. 320	1903, Sec. 1164-5 1905, p. 107 1907, No. 438	1905, p. 10 1907, No. 282	1907, No. 149		1905, p. 106
	.03			1907, c. 37	1905, c. 26 1907, c. 182	1903, c. 65 1907, c. 37	1907, c. 59		1903, c. 8 1907, c. 43
Sec. 8	.02	1907, c. 94	1907, c. 93	1905, c. 105	1905, c. 108 1907, c. 8		1905, c. 106, 107, 5	1905, c. 105 1907, c. 89	
c. 44			1907, c. 44	1907, c. 44	1907, c. 44	1907, c. 44		1907, c. 44	1907, c. 44
				1907, c. 197	1907, c. 197	1907, c. 197			1903, c. 257 1904, c. 209 1906, c. 301
c. 429			1907, c. 429	1907, c. 429	1907, c. 429	1907, c. 429		1907, c. 429	1906, c. 109 1907, c. 429, 578
	.02½*	1907, c. 216		1903, c. 342 1905, c. 545 1907, Sec. 3 1907, c. 2632	1903, c. 126 1907, c. 210, 465	1903, c. 444, 693			
	.02½*	1907, c. 199		1903, c. 145 1907, c. 200	1903, c. 147 1907, c. 210	1905, c. 152 1907, c. 201	1903, c. 144 1907, c. 209		1903, c. 148, 301, 548 1905, c. 150
c. 244	.02		1906, c. 244		1906, c. 244			1906, c. 244	1904, p. 537 1905, c. 206, 232 1906, c. 247 1906, p. 191
c. 53			1907, c. 53	1907, c. 53	1907, c. 53	1905, c. 225 1907, c. 53	1907, c. 53	1903, c. 101 1907, c. 53	1907, c. 53
	.02							1905, c. 480	1905, c. 206
c. 51	.03	1904, c. 250	1905, No. 446		1906, c. 8, 52, 2169 1907, No. 241, 314	1903, c. 55	1906, c. 65, 73	1905, No. 480	
	.02½		1907, c. 221	1907, c. 216	1907, c. 212, 214	1907, c. 212		1905, c. 480	
					1903, c. 2160 1907, No. 690	1907, No. 690		1903, c. 210	
			1905, p. 412 1907, c. 42	1907, c. 184	1905, c. 133 1907, c. 156	1905, c. 107		1903, c. 68	
		1904, No. 95	1906, No. 122, 123	1906, No. 126, 122	1906, No. 126, 118 1906, No. 124	1906, No. 126, 118	1904, c. 96 1906, No. 120	1906, No. 126	1903, c. 69 1904, c. 93, 97 1906 No. 125, 126, 118
c. III.	.02-.03½	1906, c. 256		1903, c. 260	1904, c. III. 1906, c. 298	1904, c. IV. 1906, c. 301	1904, c. IV.		
	.03			1907, c. 81, 142	1907, c. 81	1907, c. 81	1907, c. 81		
c. 362	.02†		1905, c. 486	1903, c. 107, 368, 582 1905, c. 362 1907, c. 582	1903, c. 63 1905, c. 362	1903, c. 63 1905, c. 362		1905, c. 386 1907, c. 386	1907, c. 454, 595

*Kentucky, 1906, c. 91; Oklahoma, 1905, c. 10, article 4.

†Connecticut, 1907, c. 225.

‡New Hampshire, 1905, c. 107.

§Arizona, 1903, c. 48.

||New Hampshire, 1903, c. 88; Maryland, 1904, c. 620; West Virginia, 1907, c. 43; Oklahoma in Constitution.

||Connecticut, 1907, c. 242; Maryland, 1906, c. 454; *West Virginia, 1907, c. 59.

||Connecticut, 1907, c. 125, 268, 224; Oklahoma, 1903, c. 83; New Mexico, 1905, c. 41.

(This does not include Public Safety Laws reg.)

||Louisiana, 1904, Sec. 2; 1904, c. 24; Delaware

||Connecticut, 1905, c. 140, 104, 126; 1907, c. 1905, c. 41; Maryland, 1906, c. 717; New Ham

		.02*			1905, p. 109 1907, Sec. 1075 1907, No. 320	1903, Sec. 1164-5 1905, p. 107 1907, No. 438	1905, p. 10 1907, No. 282	1907, No. 149	
		.03			1907 c. 37	1905, c. 26 1907, c. 182	1903, c. 65 1907, c. 37	1907, c. 59	
10	1907, Sec. 8	.02	1907, c. 94	1907, c. 93	1905, c. 105	1905, c. 108 1907, c. 8		1905, c. 106, 107, 5	1905, c. 105 1907, c. 89
30	1907, c. 44			1907, c. 44	1907, c. 44	1907, c. 44	1907, c. 44		1907, c. 44
					1907, c. 197	1907, c. 197	1907, c. 197		
30	1907, c. 429			1907, c. 429	1907, c. 429	1907, c. 429	1907, c. 429		1907, c. 429
		.02½*	1907, c. 216		1903, c. 342 1905, c. 545 1907, Sec. 3 1907, c. 2632	1903, c. 126 1907, c. 210, 465	1903, c. 444, 693		
		.02½*	1907, c. 199		1903, c. 145 1907, c. 200	1903, c. 147 1907, c. 210	1905, c. 152 1907, c. 201	1903, c. 144 1907, c. 209	
	1906, c. 244	.02		1906, c. 244		1906, c. 244			1906, c. 244
	1907, c. 53			1907, c. 53	1907, c. 53	1907, c. 53	1905, c. 225 1907, c. 53	1907, c. 53	1903, c. 101 1907, c. 53
		.02							1905, c. 480
	1903, c. 51	.03	1904, c. 250	1905, No. 446		1906, c. 8, 52, 2169 1907, No. 241, 314	1903, c. 55	1906, c. 65, 73	1905, No. 480
		.02½		1907, c. 221	1907, c. 216	1907, c. 212, 214	1907, c. 212		1905, c. 480
						1903, c. 2160 1907, No. 690	1907, No. 690		1903, c. 210
				1905, p. 412 1907, c. 42	1907, c. 184	1905, c. 133 1907, c. 156	1905, c. 107		1903, c. 68
			1904, No. 95	1906, No. 122, 123	1906, No. 126, 122	1906, No. 126, 118 1906, No. 124	1906, No. 126, 118	1904, c. 96 1906, No. 120	1906, No. 126
	1904, c. III.	.02-.03½	1906, c. 256		1903, c. 260	1904, c. III. 1906, c. 298	1904, c. IV. 1906, c. 301	1904, c. IV.	
		.03			1907, c. 81, 142	1907, c. 81	1907, c. 81	1907, c. 81	
	1905, c. 362	.02†		1905, c. 486	1903, c. 107, 368, 582 1905, c. 362 1907, c. 582	1903, c. 63 1905, c. 362	1903, c. 63 1905, c. 362		1905, c. 386 1907, c. 386

*Kentucky, 1906, c. 91; Oklahoma, 1905, c. 10, article 4.

†Connecticut, 1907, c. 225.

‡New Hampshire, 1905, c. 107.

§Arizona, 1903, c. 48.

||New Hampshire, 1903, c. 88; Maryland, 1904, c. 620; West Virginia, 1907, c. 43; Oklahoma in Constitution.

||Connecticut, 1907, c. 242; Maryland, 1906, c. 454; *West Virginia, 1907, c. 59.

||Connecticut, 48; Utah, 1903, c.

(This does not

||Louisiana, 19

||Connecticut,

1905, c. 41; Mar

.....	1905, p. 106	1905, p. 112	1907, No. 152 1907, No. 131	.....	1903, c. 130, 129 1903, c. 126,
.....	1903, c. 8 1907, c. 43	1907, c. 5	1903, c. 101 1905, c. 24 1907, c. 37	1907, c. 37	.....
, c. 105 , c. 89	.....	.....	1907, c. 90	1907, c. 90	1903, c. 28 1905, c. 40
, c. 44	1907, c. 44	.....	1907, c. 44	1907, c. 44	1905, c. 93, 144, 146
.....	1903, c. 257 1904, c. 209 1906, c. 301	.....	1907, c. 197	.....	1903, c. 257 1906, c. 141
, c. 429	1906, c. 109 1907, c. 429, 578	1907, c. 523, 627	1906, c. 380 1907, c. 429	1907, c. 429	1903, c. 515 1904, c. 228 1905, c. 727 1907, c. 429
.....	.....	1907, c. 456	1903, c. 552 1905, c. 335 1907, c. 330	.....	1905, c. 187 1907, c. 466, 472
.....	1903, c. 148, 301, 548 1905, c. 150	1907, c. 207	1907, c. 205	.....	1907, c. 53
c. 244	1904, p. 537 1905, c. 206, 232 1906, c. 247 1906, p. 191	.....	1904, p. 615 1905, c. 244, 247	1906, c. 244	1904, p. 570
c. 101 c. 53	1907, c. 53	.....	1905, c. 41 1907, c. 53	1907, c. 53	.....
c. 480	1905, c. 206	.....	1903, c. 208 1907, No. 250	1907, No. 250	1903, c. 209 1903, c. 551, 14 1905, c. 184 1907, No. 250
No. 480	.....	.....	1905, c. 2137 1905, c. 451, 492	.....	1903, c. 68
c. 480	.....	1907, c. 220	.....	.....	1907, c. 217
c. 210	.....	.....	.....	.....	1903, c. 10, 11, 115 1903, c. 199, 210 1907, c. 252, 464
c. 68	.....	1907, c. 5, 51, 122	1905, c. 56 1907, c. 32, 41	.....	1903, c. 65, 99 1905, c. 109
No. 126	1903, c. 69 1904, c. 93, 97 1906 No. 125, 126, 118	.....	1904, No. 91, 93 1905, c. 151 1906, No. 126, 118	.....	1906, No. 126 1906, No. 118
.....	.....	1907	1904, c. IV 1904, c. 171	.....	1903, c. 270 1904, c. II, 48 1906, c. 296
.....	.....	.....	1903, c. 158 1907, c. 81	1907, c. 81	.....
c. 386 c. 386	1907, c. 454, 595	1907, c. 655	1905, c. 362 1907, c. 402, 505	1905, c. 362	1903, c. 49, 370, 391 1907, c. 576

²Connecticut, 1907, c. 125, 268, 224; Oklahoma, 1903, c. 9; Rhode Island, 1905, c. 1217; Delaware, 1905, c. 68, 205-7; Arizona, 1903, c. 76, Utah, 1903, c. 83; New Mexico, 1905, c. 41, 52; Kentucky, 1906, c. 62.

This does not include Public Safety Laws regulating Grade Crossings and Hours of Labor).

³Louisiana, 1904, Sec. 2; 1904, c. 24; Delaware, 1905, c. 151; Mississippi, 1906, c. 135; New Hampshire, 1907, c. 100.

⁴Connecticut, 1905, c. 149, 104, 126; 1907, c. 124, 223, 246; Utah, 1903, c. 108; 1905, c. 4, 29; Arizona, 1905, c. 42, 140; West Virginia, 1905, c. 41; Maryland, 1906, c. 717; New Hampshire, 1903, c. 32, 102; Kentucky, 1906, c. 91; Louisiana, 1906, c. 186; Idaho, 1905, p. 154.

No.	Name	Address	City
1	John Doe	123 Main St	New York
2	Jane Smith	456 Elm St	Chicago
3	Robert Brown	789 Oak St	Los Angeles
4	Mary White	101 Pine St	San Francisco
5	James Green	202 Cedar St	Philadelphia
6	Elizabeth Black	303 Birch St	Boston
7	William Gray	404 Spruce St	Washington
8	Anna Hall	505 Willow St	St. Louis
9	Charles King	606 Ash St	Portland
10	Grace Lee	707 Hickory St	San Diego
11	Frank Miller	808 Sycamore St	Denver
12	Henry Wilson	909 Walnut St	Seattle
13	Olivia Moore	1010 Chestnut St	San Jose
14	George Taylor	1111 Maple St	San Antonio
15	Lillian Anderson	1212 Elm St	San Marcos
16	Edward Clark	1313 Oak St	San Bernardino
17	Frances Evans	1414 Pine St	San Luis Obispo
18	Harold Foster	1515 Cedar St	San Luis Valley
19	Irene Gibson	1616 Birch St	San Luis Potosi
20	Joseph Hall	1717 Spruce St	San Luis de la Paz
21	Katherine King	1818 Willow St	San Luis de Rioverde
22	Lawrence Lee	1919 Ash St	San Luis de la Victoria
23	Margaret Miller	2020 Sycamore St	San Luis de la Trinidad
24	Nathan Moore	2121 Walnut St	San Luis de la Cruz
25	Opal Taylor	2222 Chestnut St	San Luis de la Esperanza
26	Peter Anderson	2323 Maple St	San Luis de la Victoria
27	Rebecca Clark	2424 Elm St	San Luis de la Cruz
28	Samuel Evans	2525 Oak St	San Luis de la Trinidad
29	Tina Foster	2626 Pine St	San Luis de la Cruz
30	Ulysses Gibson	2727 Cedar St	San Luis de la Cruz
31	Vernon Hall	2828 Birch St	San Luis de la Cruz
32	Wendell King	2929 Spruce St	San Luis de la Cruz
33	Xavier Lee	3030 Willow St	San Luis de la Cruz
34	Yvonne Miller	3131 Ash St	San Luis de la Cruz
35	Zachary Moore	3232 Sycamore St	San Luis de la Cruz
36	Adeline Taylor	3333 Walnut St	San Luis de la Cruz
37	Benjamin Anderson	3434 Chestnut St	San Luis de la Cruz
38	Carlita Clark	3535 Maple St	San Luis de la Cruz
39	Dennis Evans	3636 Elm St	San Luis de la Cruz
40	Evelyn Foster	3737 Oak St	San Luis de la Cruz
41	Frederick Gibson	3838 Pine St	San Luis de la Cruz
42	Gladys Hall	3939 Cedar St	San Luis de la Cruz
43	Harold King	4040 Birch St	San Luis de la Cruz
44	Irene Lee	4141 Spruce St	San Luis de la Cruz
45	James Miller	4242 Willow St	San Luis de la Cruz
46	Katherine Moore	4343 Ash St	San Luis de la Cruz
47	Lawrence Taylor	4444 Sycamore St	San Luis de la Cruz
48	Margaret Anderson	4545 Walnut St	San Luis de la Cruz
49	Nathan Clark	4646 Chestnut St	San Luis de la Cruz
50	Opal Evans	4747 Maple St	San Luis de la Cruz
51	Peter Foster	4848 Elm St	San Luis de la Cruz
52	Rebecca Gibson	4949 Oak St	San Luis de la Cruz
53	Samuel Hall	5050 Pine St	San Luis de la Cruz
54	Tina King	5151 Cedar St	San Luis de la Cruz
55	Ulysses Lee	5252 Birch St	San Luis de la Cruz
56	Vernon Miller	5353 Spruce St	San Luis de la Cruz
57	Wendell Moore	5454 Willow St	San Luis de la Cruz
58	Xavier Taylor	5555 Ash St	San Luis de la Cruz
59	Yvonne Anderson	5656 Sycamore St	San Luis de la Cruz
60	Zachary Clark	5757 Walnut St	San Luis de la Cruz
61	Adeline Evans	5858 Chestnut St	San Luis de la Cruz
62	Benjamin Foster	5959 Maple St	San Luis de la Cruz
63	Carlita Gibson	6060 Elm St	San Luis de la Cruz
64	Dennis Hall	6161 Oak St	San Luis de la Cruz
65	Evelyn King	6262 Pine St	San Luis de la Cruz
66	Frederick Lee	6363 Cedar St	San Luis de la Cruz
67	Gladys Miller	6464 Birch St	San Luis de la Cruz
68	Harold Moore	6565 Spruce St	San Luis de la Cruz
69	Irene Taylor	6666 Willow St	San Luis de la Cruz
70	James Anderson	6767 Ash St	San Luis de la Cruz
71	Katherine Clark	6868 Sycamore St	San Luis de la Cruz
72	Lawrence Evans	6969 Walnut St	San Luis de la Cruz
73	Margaret Foster	7070 Chestnut St	San Luis de la Cruz
74	Nathan Gibson	7171 Maple St	San Luis de la Cruz
75	Opal Hall	7272 Elm St	San Luis de la Cruz
76	Peter King	7373 Oak St	San Luis de la Cruz
77	Rebecca Lee	7474 Pine St	San Luis de la Cruz
78	Samuel Miller	7575 Cedar St	San Luis de la Cruz
79	Tina Moore	7676 Birch St	San Luis de la Cruz
80	Ulysses Taylor	7777 Spruce St	San Luis de la Cruz
81	Vernon Anderson	7878 Willow St	San Luis de la Cruz
82	Wendell Clark	7979 Ash St	San Luis de la Cruz
83	Xavier Evans	8080 Sycamore St	San Luis de la Cruz
84	Yvonne Foster	8181 Walnut St	San Luis de la Cruz
85	Zachary Gibson	8282 Chestnut St	San Luis de la Cruz
86	Adeline Hall	8383 Maple St	San Luis de la Cruz
87	Benjamin King	8484 Elm St	San Luis de la Cruz
88	Carlita Lee	8585 Oak St	San Luis de la Cruz
89	Dennis Miller	8686 Pine St	San Luis de la Cruz
90	Evelyn Moore	8787 Cedar St	San Luis de la Cruz
91	Frederick Taylor	8888 Birch St	San Luis de la Cruz
92	Gladys Anderson	8989 Spruce St	San Luis de la Cruz
93	Harold Clark	9090 Willow St	San Luis de la Cruz
94	Irene Evans	9191 Ash St	San Luis de la Cruz
95	James Foster	9292 Sycamore St	San Luis de la Cruz
96	Katherine Gibson	9393 Walnut St	San Luis de la Cruz
97	Lawrence Hall	9494 Chestnut St	San Luis de la Cruz
98	Margaret King	9595 Maple St	San Luis de la Cruz
99	Nathan Lee	9696 Elm St	San Luis de la Cruz
100	Opal Miller	9797 Oak St	San Luis de la Cruz

Before the Wisconsin two-cent fare law was enacted, the railway commission made a careful examination of the passenger fares of the state, and declared itself in favor of a maximum no lower than two and one-half cents per mile, but the legislature disregarded the expert opinion of the commission and fixed an arbitrary maximum at two cents for all railways with receipts of \$3,500 or over per mile. In this the railways of Wisconsin acquiesced, but in other states, notably Pennsylvania, Alabama, Mississippi, Nebraska and North Carolina, the railways appealed to the courts.

The acts of Pennsylvania and North Carolina have already been finally declared to be unconstitutional. Whether or not the remaining maximum fare laws will likewise be overthrown, the wisdom of fixing fares by a sweeping and inflexible statute instead of through an expert commission is at least questionable.

In addition to the statutes fixing maximum fares, nine states passed laws relative to *passenger mileage books*.³⁸ The usual provisions are that mileage books of specified amounts must be sold; that they are to be transferable; and that the rate is not to exceed a specified maximum per mile.

The number of statutes³⁹ enacted during the last five years, fixing maximum *freight rates*, is insignificant in comparison with those fixing maximum fares. Nine states, however, adopted such laws. The Alabama rate law of 1907, after dividing railways into four classes, divides the bulk of intra-state traffic into twenty-two classes. It then prescribes a maximum rate for each class, above which neither the railway commission nor the railway may fix an actual rate. Separate maximum schedules are, also, prescribed for cottonseed oil, oil cake, cottonseed, ashes, and fertilizers. Minnesota in the same year enacted the well known freight rate act, recently declared unconstitutional by the United States Supreme Court.^{39a} Many of the chief commodities which had previously paid commodity rates were by statute placed within the Minnesota classification, and each class was given a maximum rate. Practically all agricultural products, lumber and live stock, the highly important factors of Minnesota freight, were in this way divided into statutory classes and deprived of commodity rates.

In Nevada the identical rate law which creates the rate-making

³⁸See Table II.

³⁹See Table II.

^{39a}See Table II.

commission fixes a complete maximum schedule of rates for both classified and unclassified traffic, and adopts the western classification. A Nebraska statute of 1907, prescribes maximum rates for live stock, potatoes, grain and grain products, fruit, coal, lumber and building material in carload lots. A Kansas rate law of 1905 prescribed schedules for oil, gasoline, fuel oil and petroleum, and two years later similar schedules were fixed for cereals and cereal products. In 1905 the Missouri legislature fixed maximum rates for six classes of freight in car-load lots, as well as for stone, crushed rock, sand and brick in car-load lots; and in 1907, it raised all these maximum rates and prescribed maximum rates and car-load weights for fruit. Similar, though less comprehensive, rate statutes were enacted in North Carolina, South Carolina, Maryland and North Dakota.

(4) *Statutes Regulating the Service of Common Carriers.*—The car shortage during the years 1905, 1906 and part of 1907, and the frequent complaint that cars were not fairly distributed resulted in an unusually large number of statutes designed to regulate *car service*. Twenty-five states enacted car service laws, and in twenty of them,—Alabama, Colorado, Indiana, Kansas, Minnesota, Missouri, Arkansas, Georgia, Louisiana, Mississippi, North Dakota, South Carolina, Virginia, Oklahoma, Oregon, North Carolina, South Dakota, Texas, Vermont and Washington,—they provided for reciprocal demurrage. As is indicated in the following table (Table III) the provisions of the reciprocal demurrage laws show little uniformity other than that the shipper is usually obliged to unload or load his cars within a period of forty-eight or seventy-two hours or pay a demurrage of from one to five dollars per car for each day of delay. On the side of the carrier the number of cars, the time limit, the demurrage charges, the number of miles per day which the cars must move and the time allowed for delivery are usually specified, but without uniformity in the different states. The demurrage in the more recent statutes seldom exceeds five dollars per car per day. The Texas law, which provided for a penalty of twenty-five dollars if ten cars were not furnished within six days or fifty in ten days, was declared unconstitutional,⁴⁰ as a burden upon interstate commerce and beyond the police power of the state.

The remainder of the car service statutes usually provide that

⁴⁰*Houston and Texas Central Railway vs. Mayes*, 2014, S. 321.

TABLE III.—RECIPROCAL DEMURRAGE ACTS (1903-1907).

STATE.	SHIPPERS' DEMURRAGE.		CARRIERS' DEMURRAGE.					
	Free time.	Penalty, per car per day.	Number of cars.	Free time.	Penalty, per car per day.	Miles per day.	Delivery at destination.	Penalty, per car per day.
Alabama.....	48-72 hours	\$1.00; total not over \$10	3 4-9 10-25	2 days 5 10	\$1.00; total not over \$10	50	24 hours	\$1.00
Arkansas.....	48 hours	\$5.00	.....	6 days	\$5.00	50	24 hours	\$5.00
Colorado.....	48 hours	\$1.00	.....	3 days	\$1.00	Reasonable	Reasonable	Damage
Georgia.....	48 hours	\$1.00	.....	4 days	\$1.00	50	48 hours	\$1.00
Indiana ¹.....	.....	.....	.....	48 hours	\$1.00 \$2.00 (coal)	50	24 hours	\$5.00
Kansas.....	48-72 hours	\$5.00	1-9 10-29 30+	3 days 6 10	\$5.00	50	24 hours	\$5.00
Louisiana.....	Additional time on coal, coke, watermelons, perishable meats and export goods	.....	.....	10 days	\$1.00	.....	Reasonable	.....
Minnesota.....	48-72 hours	\$1.00	1-3 4+	48-72 hours 1 day additional	\$1.00	50	24 hours	\$1.00
Missouri.....	48-72 hours	.....	.....	4 days	\$1.00	60	12-24 hours	\$1.00
Mississippi.....	.....	.....	.....	5 days	\$1.00	.....	No delay by switching to side tracks	\$1.00
North Carolina.....	.....	.....	.....	4 days	\$1.00	50 m.—3 days; 24 hours each additional 25 m.	48 hours	\$25 1st day, \$5 thereafter; ½ for L. C. L.
North Dakota.....	.....	.....	2	72 hours	\$2.00	.....	60 hours	Refusal to accept
Oregon.....	48 hours	\$2.00	1-5 6-10 11-29 30+	5 days 10 15 20	\$2.00	Reasonable	Reasonable	\$2.00
Oklahoma.....	.....	\$1.00	.....	.....	\$1.00	60	.....	\$1.00
South Carolina.....	72 hours	.....	.....	3-4	\$1.00	.....	48 hours	\$1.00
South Dakota.....	Must begin loading in 48 hours	\$5.00	1-9 10+	72 hours 6 days	\$1.00	50	.....	\$1.00
Texas ²	48-72 hours	\$25.00	1-10 50+	3 days 10	\$25.00	Reasonable	Reasonable	.....
Vermont ³.....	.....	.....	.....	4 days	\$1000 and damages	.....	.....	.....
Virginia.....	.....	.....	.....	4 days	\$1.00	50	24	\$1.00
Washington.....	48 hours	\$1.00	10	6 days	\$1.00	50	24	\$1.00

¹ Penalty not imposed if there was reasonable effort.² Unconstitutional. Act of 1907 calls for reasonable car service.³ Penalty not imposed if failure is due to car shortage.

there shall be a "reasonable and fair distribution" of cars between applicants. As was previously noted, moreover, in the fifteen states creating new commissions, as well as in Virginia and North Carolina, the supervision of car distribution was placed in the hands of the railway commissions.

A second field of service regulation is that of *stations and terminals*. Twenty-seven separate states enacted statutes, the usual provision of which was that adequate stations must be built when population or traffic has attained specified amounts, and that they must be suited to the convenience of the public. It is frequently stipulated that passenger stations must be open at specified times, that they must have public telephone service, must be adequately heated and lighted, and have adequate toilet facilities.

Twenty-three states enacted laws regulating *train service and connections*. These statutes generally stipulate that through connections shall be provided and that a reasonable number of trains shall be available at all stations. In Mississippi, Texas, North Dakota, Wisconsin, Minnesota, South Carolina, Montana and Indiana it was provided that railways shall furnish bulletins announcing the arrival and departure of passenger trains.

In fifteen states, during the last five years, the *live-stock service* was the object of legislation. The usual provisions in the laws are that cattle shall be unloaded for food and rest at the end of a given number of hours, that stock cars shall be moved at the rate of say eighteen miles per hour⁴¹ on the main line and twelve miles per hour on branch lines, and that free transportation and caboose facilities shall be provided for the attendants of live stock. The Alabama law stipulates that, in the distribution of cars, live stock shall receive preference; the Montana law declares it to be a misdemeanor for a carrier to permit cattle to be shipped without inspection; in several states new statutes were enacted relative to fences⁴² and cattle guards; and in South Carolina carriers are required to furnish telegraphic information as to the movement of stock cars.

Twenty-one states regulated the construction and use of *industrial tracks* and spurs. In nine of the states creating new commissions, as well as in Maine, Texas and Kansas, control over such

⁴¹Nebraska, 1905, C. 107.

⁴²Arizona, Montana, Florida, Oklahoma, Utah, Washington, South Dakota.

tracks is vested in the commissions; a California law of 1905 required the consent of the local legislative authorities before private tracks could be constructed; and in various states⁴³ carriers were obliged to construct branch lines to a distance of from one-quarter to one-half mile from the main line unless lack of necessity could be demonstrated to the railway commission.

Lastly, twenty-one states enacted statutes concerning the service of *express companies*. In sixteen⁴⁴ of these the express service was by statute placed within the jurisdiction of their railroad commissions. The Arkansas and Florida legislatures enacted laws regulating the payment of damages by express companies; and a Nebraska statute of 1907 fixed the maximum express rates at seventy-five per cent of what they were on January first of that year.

(5) *Corporate Affairs*.—As many as thirty-six states and territories enacted statutes regulating the general corporate affairs of common carriers. Corporate powers, however, were so well defined by older laws, that few of those passed during the last five years are of special importance; but few common tendencies, moreover, are discernible. Various statutes⁴⁵ provide that electricity may be substituted for steam without obtaining a new charter; others stipulate how securities may be issued, those of Arizona, Mississippi, New York and New Hampshire being aimed directly at the issue of watered stocks and bonds. The Wisconsin statute of 1907 prohibits the issue of stock below par or of bonds at less than seventy-five per cent of their par value, and provides that dividends may be paid only on shares fully paid for and only out of net profits. Still others of these corporate statutes permit the purchase of steamboats and barges by railways.⁴⁶ The majority, however, make minor changes in the laws defining the corporate powers of common carriers.

(6) *Public Safety*.—The rapid increase in railway accidents during the last half decade was a matter of special concern to the state legislatures, and as a result statutes designed to promote

⁴³Kansas, 1905, C. 350; South Carolina, 1905, C. 480; Mississippi, 1905, C. 386; Indiana, 1907; Nebraska, 1907, C. 80.

⁴⁴New Hampshire, Massachusetts, Vermont, Alabama, Pennsylvania, Oregon, New York, Nevada, Nebraska, Montana, Michigan, Colorado, Ohio, Mississippi, Washington and Indiana.

⁴⁵California, 1905, C. 423; Nebraska, 1905, C. 40; Maryland, 1906, C. 717; Tennessee, 1903, C. 115; New Hampshire, 1903, C. 102.

⁴⁶Michigan, 1905, C. 156; Massachusetts, 1904, C. 160.

public safety were enacted in thirty-five states and territories. Of special frequency were the laws regulating the location and operation of *grade crossings*, such statutes being enacted in twenty-six states.⁴⁷ Some place the control of grade crossings directly in the hands of the commission; some provide for specified safety devices at grade crossings; some limit the maximum percentage of the grade; and others limit the speed of the trains. In various states⁴⁸ laws were enacted dealing directly with accidents by requiring that all accidents be immediately reported to the state commission, whose duty it is to investigate whenever necessary.

In seventeen states⁴⁹ and territories statutes designed largely to protect the public took the novel form of prescribing a limit to the *number of hours* of continuous labor permissible on the part of trainmen and telegraphers. The most frequent limit is sixteen hours; but in Texas, Connecticut, Missouri, New York, Wisconsin and West Virginia it is fixed at eight hours for telegraphers; and in Texas at fourteen hours for trainmen. The basis upon which these laws rest is the belief that if men who are directly concerned with the movement of trains work continuously for more than say sixteen hours they are liable unknowingly to make errors which may result in vital danger to the traveling public.

Aside from these general groups of public safety statutes, many miscellaneous provisions were enacted. Various states⁵⁰ provided for the most extreme penalties against attempts to derail trains. Some⁵¹ enacted laws requiring power brakes for locomotives and a given percentage of the cars in a train, usually seventy-five per cent; others⁵² required the adoption of automatic couplers and grab irons. Various states⁵³ fixed heavy penalties against tampering with switches and signals; some⁵⁴ prohibited the

⁴⁷Vermont, Montana, North Dakota, Kansas, Indiana, Florida, New Hampshire, Ohio, Maryland, New Jersey, Michigan, Missouri, California, Massachusetts, Pennsylvania, Maine, Arkansas, New York, Illinois, Minnesota, Oregon, Alabama, West Virginia, Oklahoma, Nevada and Wisconsin.

⁴⁸South Carolina, Minnesota, Colorado, Michigan, Montana, Nevada, New York, Pennsylvania, Massachusetts, New Hampshire and Illinois.

⁴⁹Kansas, Missouri, Maryland, Arkansas, Iowa, North Dakota, Wisconsin, Indiana, Minnesota, South Dakota, Texas, Virginia, Connecticut, Montana, New York, North Carolina and West Virginia.

⁵⁰California, Delaware, Georgia, New Mexico, Oregon, Montana, North Carolina, Rhode Island, South Carolina and Vermont.

⁵¹Indiana, Ohio, Illinois and Missouri.

⁵²Indiana, Ohio, Illinois, Missouri, Minnesota and Michigan.

⁵³Virginia, Colorado and Maine.

⁵⁴California, North Carolina and Vermont.

employment of men addicted to the use of liquor; others made special provision that a full train crew⁵⁵ is at all times to be in charge of a train. A Nebraska statute fixes the minimum age of a night telegraph operator at twenty-one years, and a similar law in Wisconsin provides that a telegrapher must be at least eighteen years of age and have had eighteen months of instruction under an experienced operator. An Alabama law stipulates that employees engaged in train movements must be able to distinguish objects, colors and sounds. The remaining statutes cited in Table II hardly call for special mention; they further illustrate the great variety of provisions enacted by the various state legislatures to protect the public and employees from bodily injury.

General Survey of the Period

The last five years as an aggregate have been a period of almost frenzied railway legislation, and it is not surprising that both wise and unwise statutes were, in the heat of public agitation, enacted by the state legislatures. The sanest legislation and that which is best withstanding the present reaction in public and court opinion, is doubtless that which placed the supervision of railroads into the hands of railroad commissions as distinct from direct control by sweeping and inflexible statutes. Whatever general tendencies have been developed in this commission legislation has likewise been sane and conservative.

The marked tendency to confer upon the commissions the power to fix rates, joint rates and classifications is but a recognition of the fact that in few states other than Massachusetts have commissions with merely advisory powers been able to cope with the rate situation. There is nothing inherently wrong in the rate-making power if it is of the conservative type, and as was previously noted eight of the thirteen newly created mandatory commissions are instructed to revise individual rates upon complaint and after hearings have been held, as contrasted with the drastic power of making rate schedules.

The tendency to vest the commissions with wide administrative powers over the service of railways cannot but lead to better results than the rigid control of service by statute. The promotion of public safety through commissions; their supervision over stock and bond issues; and their power to investigate the finances of railways

⁵⁵Indiana, Mississippi, Texas, Arkansas, Kansas and South Dakota.

leads to a far more conservative and elastic control than could be secured by rigid, prohibitory statutes. Even the power to promulgate uniform accounts is less drastic than it appears, for almost invariably the commission co-operates with the railway accountants. The judicial power to call witnesses, to have access to books and papers, and to take sworn testimony is a vital auxiliary to state railroad regulation, for in no other way can either a commission or a court arrive at an intelligent conclusion in the issue of an order.

The tendency to increase the membership from a single commissioner to a commission of three or of ten, as in New York and five in Georgia; the increased salaries of the commissioners; longer tenure of office; the more frequent practice of having them appointed rather than elected as political office holders; and the provision for the hiring of experts,—all lead to a better personnel in the commissions and a better understanding of the delicate matters which come before them.

A final tendency in commission legislation is the establishment of public utilities commissions. If railways are to be subjected to state control because of their quasi-public nature, then there is little reason why they should be singled out from other public utilities. As was previously indicated, there is an almost universal movement to extend the scope of the commission to express, sleeping car and private car companies, industrial railways, terminals and inter-urban street railways. In some it is extended to include telegraph and telephone companies, navigation companies and street railways within cities and towns. In others it is extended to nearly all public utilities. North Carolina and Virginia have "Corporation Commissions," New York and Wisconsin have Public Utilities Commissions, and the Georgia Railroad Commission has jurisdiction over a large number of public service corporations.

But the legislation of the last five years has also its anomalies. It would seem that when a state entrusts the regulation of rates, fares and service to its commission, the policy of regulating these matters directly by statute would decline. But the mere bulk of statutes above enumerated is striking evidence that statutory control has increased enormously. Not all such laws are contradictory to the principle of mandatory commissions. As was previously explained, many of the statutory provisions were enacted so as to make the work of the commissions more effective, neither is there any-

thing unusual in many of the laws concerning public safety, the corporate affairs of the railroads and other matters which are much alike in all parts of a state, and may be regulated by a blanket statute without special hardship to particular railways.

It is the statutory fixing of rates and fares that has caused the greatest complaint, and it is these that now bear the brunt of adverse court decisions. It is notable that as long ago as 1890 there were twenty-two maximum rates and fares statutes, and that during the next twelve years⁵⁶ the number was increased by but four. During the last five years, however, twenty-two states enacted maximum fare laws and nine states established maximum rate schedules by statute. With few exceptions these states also have commissions to whom they have given the power to make rates and fares.

Only slightly less inexplicable is the statutory control of the railway service. In numerous instances, the self-same states that vested their commissions with the power to supervise the service of the carriers, enacted reciprocal demurrage laws to solve the car service problem, and passed rigid statutes as to the location and construction of terminals, the running of trains, the making of connections and the building of private tracks and spurs. There were grounds for state control of the railway service, but it is questionable whether it should be in the form of statutes enacted by legislatures, or by orders issued by expert commissions.

It is not surprising that of the great number of railway statutes recently enacted some should be contested by the carriers, and this, together with their depleted earnings as a result of the industrial depression, has caused a sudden halt in the activity of the state legislatures. It is of special significance that thus far the successful attack of the railways has been against the regulative statutes and not against the commissions. In Washington, alone, has the court denied to the commission the power to fix maximum rates, because of a special provision in the state constitution reserving that power to the legislature, and this decision is not final, for it has been appealed to the Supreme Court of the United States. On the other hand, the Indiana commission law has been declared to be constitutional; the power of the South Dakota⁵⁷ railway commission over express companies, and of the North Carolina⁵⁸ corporation com-

⁵⁶ C. C. Railways in the United States in 1902, Part IV, p. 28.

⁵⁷ *Platt vs. Le Cocq*, 150, 391.

⁵⁸ *A. C. L. R. Co. vs. N. C. Corp. Com.*, 27 S. C. Rep. 285.

mission to require through connections has been recognized in court.

Rate orders of various commissions have been temporarily enjoined and are now in court for final decision,—as in Kansas, Missouri, Virginia, Alabama and South Dakota, and a western railway has prepared to test the validity of the Nebraska commission, but there is as yet no indication that the courts will reverse the decisions which they made at the time of the Granger commissions.

It is in the field of direct statutory regulation that there are numerous provisions unable to weather a constitutional test. On March 23, 1908, the United States Supreme Court, in a double case, declared unconstitutional the freight rate act of Minnesota and the passenger fare act of North Carolina because the penalty was so severe as to prevent a carrier from testing their validity, and because the court regarded their enforcement as confiscatory. The two great principles that the enjoining of a state officer is not suing the state, and that a federal court may test the validity of a state rate act were established.

In Pennsylvania the State Supreme Court declared the two-cent fare act unconstitutional on grounds of confiscation; and in Alabama the Federal Circuit Court⁵⁹ on the same grounds enjoined the two and a quarter cent fare law and the freight rate act fixing maximum rates on 110 commodities. Preparation has been made to attack the two-cent fare laws of Missouri, Illinois and Nebraska and the freight rate act of Missouri, upon the ground that the penalties they impose come within the federal ruling made against the Minnesota and North Carolina rate acts.

Various statutes other than those fixing rates and fares have, likewise, been declared unconstitutional. The Alabama, Arkansas and Missouri statutes which prohibited foreign carriers from appealing cases to a federal court upon penalty of forfeiting their right to operate within the state were overthrown as infringing upon the rights of persons to sue in federal courts, guaranteed both by the state and federal constitution, and upon the grounds that the jurisdiction of federal courts is fixed by the federal constitution and may not be limited by legislatures.⁶⁰ The Supreme Court of Missouri

⁵⁹*Seaboard Air Line Railway Co. et al. vs R. R. Com. of Alabama et al.*, 155 Fed. Rep. 792.

⁶⁰*Chi. R. I. & P. Ry. Co. vs. Ludwig*, 156 Fed. 152; *Seaboard Air Line Ry. Co. vs. R. R. Com. of Alabama*, 155 Fed. 792.

has declared unconstitutional the law requiring free transportation for shippers of live stock, as discriminating against other shippers and in violation of the fourteenth amendment. The reciprocal demurrage law of Texas was overthrown and that of Minnesota is now being tested by the Great Northern Railroad. The laws limiting the hours of telegraphers and trainmen have been upheld by the Supreme Court of Montana and a state circuit court in Wisconsin, but have not as yet been finally ruled upon by a federal court.

REGULATION OF FOREIGN COMMERCE BY THE INTER-STATE COMMERCE COMMISSION

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It is the purpose of this paper to discuss the relation of the Interstate Commerce Commission to through export and import traffic. To this end, the subject matter is grouped under four headings: the integration of ocean and inland commerce; the present authority of the Interstate Commerce Commission; the consequences of incomplete jurisdiction; and suggested legislation.

The organization of through transportation systems has changed the entire aspect of commerce within the last three decades; consequently an exposition of the integration of ocean and inland commerce may well precede the discussion of needed legislation.

I

Integration of Ocean and Inland Commerce

The most striking feature of the present organization of commerce is the through character of business and interrelation of the trunk line railroads of the United States with the various trans-oceanic carriers. The world's commerce is no longer carried on by a large number of dissociated, warring companies. Competition has given way to cooperation and merger. The old system of frequent transshipment has been replaced by through routes, through rates and through arrangements which make possible the remarkable celerity of present business transactions. The trunk line railroads and the trans-oceanic steamship companies have so splendidly organized their joint services that the shipper may now send his merchandise from an inland city of one country to a remote point in a foreign land, and have no concern as to its safety; for the contract covering the entire journey is or may be closed the moment it is given over to the initial carrier.

To-day, a miller in Minneapolis exporting flour, can secure his through bill of lading from the place of manufacture to ultimate

destination in Europe, insure the flour under a through certificate of insurance against all risks of transportation, railroad or marine, from mill to the foreign consignee, sell his bill of exchange drawn in the currency of the country to which the flour is destined, and literally do all the business connected with the transaction upon his own doorstep within the short space of time elapsing between the milling and the final shipment of the flour. On the day the flour is shipped from the mill the manufacturer is substantially free from any further responsibility or liability. This system applies not only to export flour but to the export trade in general. As a practical illustration of this, a miller in Minneapolis may buy his wheat on Monday, grind it into flour on Tuesday, sell the flour abroad on Wednesday, very readily ship it on Thursday, and one hour after the flour is loaded into railroad cars at the mill he can obtain his through export bill of lading from the mill door in the United States to the warehouse of the buyers at foreign ports of destination.

Through Conditions.—Simultaneously with the issuing of the through bill of lading, a certificate of insurance is issued by underwriters, which explicitly undertakes to cover the flour throughout the whole course of transportation. The title to the property, as well as to all the rights and responsibilities of the underwriters conveyed by the certificates of insurance, passes from one bank to another by simple successive endorsements on the bill of exchange, and this only because a through bill of lading has been issued therefor, which is the recognized inviolable title to the merchandise. The western banker readily purchases of the miller his exchange on the foreign buyer, for such documents are the most acceptable form in which a remittance can be made to foreign correspondents, but the banker would not purchase this kind of exchange at all unless a through bill of lading was attached thereto. These shipping documents the banker then sends to his correspondent in, say, Copenhagen, where they are retained by the local Danish banker to be surrendered when the flour is ultimately delivered to the consignee. In the meantime, from the day the flour was originally shipped until it is finally delivered to the consignee, the various manipulations of the property are conducted by the respective land and water transportation companies, without the intervention and indeed, substantially without the knowledge of the shipper or receiver of the cargo,

the transporters having assumed by the through agreement to relieve the seller, bankers and buyer of all these intermediate factors and conditions.

Eastbound Shipments. Western exporters constantly make through export contracts for the shipment of products on through bills of lading, with the agents of the various railroads located through the West and South. The steamship companies themselves often do not know the names of the shippers or the precise locality from which the merchandise is forwarded, until the tissue copies (duplicates) of the through bills of lading as signed by the railroad company's officers are transmitted to the steamship company's office. Such a bill of lading contains a large number of stipulations many of which are intended to frighten the unsophisticated. Those made by the inland carrier are first set forth. Then follow the conditions submitted by the ocean carrier. The merchandise to be transported is described and note made of the various marks. The inland rate and the ocean rate are shown separately. Where the agent of the railroad receives payment for the through transportation he stamps on the bill "Freight Prepaid to Destination." This is a *through* contract over a *through* route at a *through* rate.

Through Freight Prepaid. It constantly happens that the inland and ocean freight are both prepaid. This presupposes that the miller or provision packer has sold his goods at a price delivered at final destination abroad. The draft drawn and the amount of insurance is correspondingly increased as much as the inland freight and ocean freight together.

Westbound Shipments. A similar statement might be made with respect to westbound traffic originating in Europe and destined to the interior of the United States. Frequently merchandise shipped as above, on through bills of lading, from, say, Hamburg to an inland place of destination in the United States, say Chicago, has the entire ocean and inland freight prepaid. A foreign seller, like an American exporter, makes a price delivered at final destination, including the payment of entire through freight. In other cases, where merchandise is shipped from abroad at a through rate of freight on a through bill of lading, the connecting trunk line railroad collects from the party to whom it is ultimately delivered in the interior of the United States the entire through charge for transportation, and reimburses the steamship company for the ocean car-

riage. Through westbound merchandise forwarded in bond from the seaboard, is retained in the custody of the United State Government until its eventual arrival at interior port of destination. It is then surrendered to the owner of the property only upon his delivering to the collector of customs the original through bill of lading issued by the steamship company at the port of origin. Were it not for the through bill of lading, goods would be retained at the seacoast port of entry until customs duties were paid, thus involving great delay and expense.

Insurance. Contracts of insurance are daily made covering the value of the goods and assuring the owner their safe transportation (inland and marine), and their ultimate delivery. This system of through insurance is probably the most comprehensive system of insurance extant to-day, covering, as it does, all character of risks and damages on merchandise over the inland carriers, land and water, during transit, in the warehouse, or on shipboard or intermediary lighters,—the system providing for the ultimate subrogation of the interests of the owners of the property against any of the respective carriers. This is another instance where all the parties concerned in a through shipment endeavor to tie the transaction together in its entirety, so that there shall be no intermediate steps where the one insurance or responsibility has ceased before the other attaches.

Through Bill of Lading. Prior to 1880, all merchandise intended for export was forwarded by the railroads on domestic bills of lading to the seaboard and from there reforwarded on an ocean bill of lading. Often thirty or forty days elapsed before the railroad had delivered the merchandise for transshipment. An additional sixty and sometimes ninety days was consumed before the shipper was again in possession of his capital. The export bill of lading now in use was prepared by the Transatlantic Freight Conference in 1899, and approved and adopted by the Trunk Line Association and affiliated railroads April 1, 1901. It is the outcome of many years of negotiations between the trunk line railroads and the ocean carriers to formulate and promulgate an instrument which would be of acceptable and conclusive character to financiers and underwriters, the necessary intermediaries in connection with all the export or import traffic of the United States. The object was to issue a negotiable instrument which would fairly and

plainly designate the responsibilities assumed and the exceptions provided for. Originally through bills of lading were issued at only a few of the large designated commercial centers; now they are obtainable from hundreds of railroad officials throughout the United States and in all important European centers. The railroad companies now prepare and issue these through bills of lading on which eastbound or export traffic moves, for themselves and for the steamship companies. On the other hand the steamship companies issue for themselves and the trunk line railroads through bills of lading on which westbound or import traffic moves to the interior centers of the United States.

Immigrants. Immigrants upon reaching the European port of departure book to their final destination in the interior of the United States, and are manifested through via American trunk line railroads. The through passenger ticket is similar to the through bill of lading. In one case the through freight is provided for, and in the other the through fare, and in each case there is an arrangement between the ocean and inland carrier for through transportation. There is a large and constantly increasing traffic in through emigrants from interior points in the United States to European countries. No fewer than three transatlantic steamship conferences, with headquarters in New York, with their thousands of exclusive agents are engaged in conducting the immigrant and emigrant business under through systems of tickets, and of orders upon steamship companies and railroads.

Through Rates. As already noted, it frequently happens that the steamship company is without knowledge as to who engages certain freight, where it originates, or as to any other circumstance relating to it prior to the time of arrival alongside the steamer. In such instances the railroad company is serving as the agent of the steamship company. The Transcontinental Railway Freight Bureau has on file with the Interstate Commerce Commission (I. C. C. 847) a schedule of what are called inward-bound European through rates. These through rates apply via those steamship lines operating from ports of clearance in conjunction with no fewer than fourteen American railroads (among others the Illinois Central, Sante Fé System, and the Union Pacific), from thirty-six European ports (among others, Hamburg, Copenhagen, Liverpool) to such points as San Francisco, Los Angeles, and Portland. It is specially

stipulated that through rates will be protected only when the merchandise is routed by the general European agents of the American railways or authorized under the system of through bills of lading and through rates now in general use.

The import committee of the Congress of American Railways have arranged inland commodity rates on certain merchandise which apply only to through import traffic. The various steamship companies acting in concert issue on these same commodities special ocean rates of freight which they will quote or permit to be quoted only on shipments moving directly to the interior of the United States. The inland and ocean carriers have thus made special provision for through foreign traffic both as to ocean and inland movement. In arriving at the rates referred to, the American railways take into consideration the cost of the merchandise when landed at the American seaboard as compared with the appropriate selling price at ultimate destination. Thus the import inland rate on certain designated commodities bears a definite relation to the charge for the ocean transportation. It is a proportion of a through rate. Perhaps no better illustration of the complete integration of inland and ocean commerce can be offered than by referring to the Hamburg-American Company's freight service between the North Atlantic ports of the United States and the countries about the Baltic. Minneapolis and Duluth furnish great quantities of the flour, and Omaha and Kansas City great quantities of the provisions which enter into this trade. The merchandise from these various sources is moved first to Chicago, and from there is carried eastward by the trunk line railroads and lake vessels to be again distributed through various channels to the six important United States North Atlantic ports. Immediately after arrival at these ports the merchandise is transhipped on board a vessel of one of the lines serving the Baltic. On arriving at Hamburg, Bremen, Hull, or Copenhagen, depending on whether the Hamburg-American Packet Company, the North German Lloyd, the Wilson (Hull) Line, or the Scandinavian-American Line has been the ocean vehicle of transportation, a further transshipment takes place on board lighters and coasters belonging usually to the same companies as the transoceanic lines and by these latter vessels delivery at final destination is made to consignees in 150 or more Norwegian, Swedish and Finnish ports. Only the vehicle of transportation is changed. This change in vehicle very

likely occurs many times within the United States; it may also take place after the American seaboard is passed. In any event there is a through route, a through rate, and a through bill of lading. The transportation is a through transportation. It is an inseparable entirety.

From the foregoing, it is clear that the trunk line railroads and their connections, in conjunction with the ocean steamship companies, have assumed a through contract to deliver the merchandise (dangers and accidents of the sea excepted) to the ultimate port of destination, and that until so delivered the property is covered by inland or marine insurance, or by liability of the common carrier against substantially all risks of land and water. Thus the shipper is made absolutely secure. Given perfect freedom of ocean transportation in addition to through conditions and perfection in transportation is reached.

Unfortunately, such conditions do not exist. But is not the sea a highway free to all? Both the Supreme Court of the United States and the Interstate Commerce Commission¹ have answered this query in the affirmative. Said Mr. Justice Bradley in *Railroad Company v. Maryland*, 21 Wall. 456:

Page 470, "Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them."

This opinion was handed down in 1874, before any of the modern conditions which affect through trade began to make themselves felt. The Atlantic cable had barely been put into successful operation, and the through bill of lading was substantially unknown. The words of the learned judge are, however, as true to-day as when he first gave them utterance. No franchise is needed to sail the seas, nor will such a franchise ever be required. In the face of this assertion, it may seem paradoxical, but it is nevertheless undeniable, that on no portion of the earth's surface are the means of transportation so completely controlled and monopolized as they are on the high seas.

No better example can be cited than the conditions under which

¹*Cosmopolitan Shipping Co. vs. Hamburg-American Packet Co.*, 13 I. C. C. Rep. 266.

is conducted the commerce of the United States with northern Europe. This great commerce is carried on under agreements among certain steamship aggregations. The English, French, and American transatlantic steamship interests, fearing destructive competition on the part of the German interests, agreed, in 1902, not to transport for a period of twenty years either passengers or merchandise by direct steamers to or from northern European continental ports. This agreement leaves the control of the entire trade of northern continental Europe in the hands of the Hamburg-American Packet Company and its associates, which together constitute the Baltic pool.² Not only have certain steamship interests divided the field, but they have in addition apportioned traffic. This applies particularly to the Baltic trade of the United States.

The sea itself is still a highway free to all, but when one carrier controls 100 per cent of the westbound and 97 per cent of the eastbound traffic of the six great North Atlantic ports of the United States with the most important port of continental Europe (Hamburg), as was the case in 1906, there is a monopoly in transportation.³

The export and import trade of the United States with Germany in 1906 was \$389,000,000. During 1907 this trade increased to \$418,000,000. The figures for the calendar year 1907 (\$435,000,000) indicate that the total for the fiscal year 1908 will not be far from \$450,000,000. This immense trade is carried on almost exclusively by two steamship companies, the Hamburg-American Packet Company and the North German Lloyd.

Effect of Competition of Charter Tonnage

But will not the actual or potential competition of charter tonnage minimize the evils which might arise from steamship pools and monopolies? It must be evident from the through nature of traffic that charter tonnage and similar competition is not only

²The Cunard Line has kept itself freer from pool agreements than have the other lines.

³Number sailings eastbound in 1906 from Boston, New York, Philadelphia, Baltimore, Norfolk and Newport News to Hamburg:

Hamburg-American Packet Company; Union Line, owned and operated by Hamburg-American Packet Company.....	198
Other sailings	9

a negligible factor but that it is non-existent in so far as merchandise is carried on through bills of lading.⁴ In the transoceanic trade, charter tonnage does not and cannot offer an effective successful competition to line steamers, for it is without the following essential elements in through transportation:

1. To become a successful competitor requires—
 - (a) Regular sailings from a fixed berth.
 - (b) Facilities for granting through bills of lading, east and west bound, as well as local bills of lading.
 - (c) Terminals, at which traffic as it currently arrives can be received and cared for preparatory to transshipment aboard ocean carriers.
2. Such organized responsibilities in connection with the issuing of bills of lading (local and through) as would be satisfactory to shippers, bankers, underwriters, buyers, and others concerned.
3. Chartered steamers would not be willing to fit themselves with dunnage and other requirements necessitated by the miscellaneous character of the general cargo to be carried, nor would marine underwriters, unless at exorbitant premiums of insurance, cover perishable or delicate cargo by such conveyance.
4. In the transoceanic trade, chartered tonnage rarely supplements the capacity of line steamers, except for the single article of grain, and then only when grain freight rates are much above an average figure.
5. Under ordinary conditions merchandise is now transported from Chicago to the seaboard in fifteen to thirty days. It is therefore idle to assume that either charter tonnage or "fill up" rates can in any way affect the transportation of commodities other than in the case of those originating at the seaboard.

As industries, such as steel and iron have been integrated, so also have the transportation systems of the world become welded into a compact organization. This amalgamation has brought with it great evils, but it has also been a great boon to the commercial world. Twenty-one years ago the American people determined to rectify the wrongs which carriers were in the habit of visiting on shippers. To this end, they passed an act to regulate commerce.

⁴Each succeeding year charter tonnage becomes less and less a factor in world transportation. See *Railroad Gazette*, Vol. 44, May 8, 1908, *The Ocean Carrier*, J. Russell Smith.

When that act was passed, the process of amalgamation had scarcely begun. The logical outcome of integration was totally unforeseen. No one dreamed that ocean commerce would be so organized as to form an essential and inseparable part of inland commerce. No one imagined it possible to construct the monster *Mauretania*. No one would have prophesied that a single company would in less than a quarter of a century possess more tonnage than the over-sea steam tonnage of America. No one would have risked his reputation by asserting that within twenty years a foreign steamship company would reach into the storehouses and mills and factories of our middle West. Yet such are the conditions at present.

II

Present Authority of the Interstate Commerce Commission

The Interstate Commerce Commission was created by an act of Congress, February 4, 1887.⁵ In the Hepburn Bill, June 29, 1906, entitled "An Act to Regulate Commerce,"⁶ many of the defects in the former act were remedied. The commission has risen from the capacity of an advisory board to the dignity of a court with inquisitorial powers. It is the purpose of this portion of the paper to discover the intent and control which the commission may exercise under this act over through traffic as described in the foregoing pages.

The first section of the law defines the jurisdiction of the commission. Eliminating unimportant words, it is as follows:

That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity . . . and to any common carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) . . . from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property, shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the

⁵24 S. L. 379.

⁶59 Congress, Sess. I, Ch. 3591.

United States and carried to such place from port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country or to any state or territory as aforesaid.

The carriers affected by the act are primarily railroads. Under certain circumstances water carriers may also come within the act, but this occurs only when there is some common control, management, or arrangement existing between a rail and a water carrier. Thus a steamship company transporting coal from Philadelphia to New York is exempt from the provisions of the act. Suppose that same steamship company enters into a contract with the Reading Railroad Company to carry coal to New York brought by the rail carrier to Philadelphia, then the steamship company, by virtue of this contract, would make itself amenable to the federal act.

The commerce affected falls into two groups: first, that destined to or emanating from adjacent foreign countries; second, that carried on within the United States. The purpose of the phrase, "adjacent foreign countries," is to give the commission control over the commerce moving partly within and partly without the United States, in the same manner and to the same extent that it exercises authority over commerce moving from state to state. It has been decided by a federal judge, and also in a case before the Interstate Commerce Commission that "adjacent" means contiguous. In the former,⁷ Canada and Mexico were specifically named as being adjacent; in the latter,⁸ Cuba is declared to be not adjacent, and⁹ "substantial continuity of rails" is asserted to be the essential feature of the term "adjacent."

The immense and rapidly growing commerce to foreign countries not adjacent, described in the first part of this paper, is without the jurisdiction of the Commission, although much of our foreign commerce to non-contiguous territories is forwarded on through bills of lading from the interior of the United States, and is carried by rail to the seaboard and then transported on board a

⁷United States *vs.* Chicago, Burlington and Quincy, Judge McPherson (unreported).

⁸Lykes Steamship Line *vs.* Commercial Union *et al.*, 13 I. C. C. Rep. 310.

⁹Decided April 6, 1908.

steamer, ultimately arriving at the port of destination without the intervention of the shipper or any one on his behalf. In the case of the *Cosmopolitan Shipping Company vs. Hamburg-American Packet Co. et al.*, 13 I. C. C. 266,¹⁰ Commissioner Lane, speaking for the commission, offered four reasons for lack of jurisdiction:

1. Such construction was given to the act by the Senate committee which presented the original act of 1887.

2. The act itself elsewhere (than in section 1) defines the carriers engaged in interstate commerce to which the act was made applicable.

3. Such construction is alone consistent with other provisions of the act.

4. The decisions of the courts lean toward such construction.

- (1) The chairman of the Senate committee, in presenting the original act to the Senate in the year 1886, used these words:

While the provisions of this bill are made to apply mainly to the regulation of interstate commerce, in order to regulate such commerce fairly and effectively it has been deemed necessary to extend its application also to certain classes of foreign commerce which are intimately intermingled with interstate commerce, such as shipments between the United States and adjacent countries by railroad, and the transportation by railroad of shipments between points in the United States and ports of transshipment or of entry when such shipments are destined to or received from a foreign country on through bills of lading.

- (2) The act of 1887 authorized and provided a method of procedure whereby the enforcement of the provisions of section 6, touching the filing of tariffs, might be secured in the following words:

And the said commissioners, as complainants, may also apply in any such circuit court of the United States for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several states and territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several states and territories of the United States, as mentioned in the first section of the act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

¹⁰Decided March 9, 1908.

The wording of section 1 as to foreign commerce remains to-day as it was in 1887. The act of 1906 left out section 6. But, said the Commission, through Commissioner Lane, page 273: "The omission of this provision, therefore, we do not take as indicating that thereby any extension of the jurisdiction of the Commission was intended."

(3) If it had been the intention of Congress to give the Commission jurisdiction over water carriers transporting foreign commerce, it might be expected that adequate machinery for law enforcement would have been provided. In Commissioner Lane's opinion the following appears:

Page 274, "We look in vain, however, through the many provisions of this statute for the slightest recognition of such carriers or of the traffic which they handle. No machinery has been set up in the act by which its provisions can be enforced as to transatlantic steamship lines."

(4) The belief held by many, that the jurisdiction of the commission was co-extensive with the commerce of the United States, was based largely upon the language of the court in the Texas and Pacific case, 162 U. S. 197. After quoting the words of the earlier act, which are identical with those of the present act, beginning with the words, ". . . carriage to such place from a port of entry either in the United States or an adjacent foreign country," the learned judge in handing down the opinion of the court said:

Page 312, "It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state) as well that between the states and territories as that going or coming from foreign countries."

The Supreme Court never intended that broad construction which these words seem to convey. Judge Sanborn when called upon to interpret section 1 of the Act to Regulate Commerce, in the case of *United States vs. Colorado and Northwestern R. R. Co.*,^{10a} referring to the Texas and Pacific case, said:

Page 329, "The statement that Congress had in view the whole field of interstate commerce when it passed this act is far from an assertion, and could never have been intended to be a declaration that Congress had regulated, or had intended by that act to regulate, every carrier engaged in interstate commerce within its regulating power, for that was obviously not the fact."

^{10a} 157 Fed. 321.

In the dissenting opinion in the Texas and Pacific case of Mr. Justice Harlan, with whom concurred Mr. Justice Brown, is to be found a comprehensive statement as to the limitations placed on the authority which may be exercised by the commission. Referring to section 1 of the Act to Regulate Commerce, he said:

Page 245, "From this section it is clear that the Texas and Pacific Railway Company is, and that the ocean lines connecting with that company are not, subject to the provisions of the act."

The first direct and final exposition of the jurisdiction of the commission is to be found in Commissioner Lane's opinion in the Cosmopolitan case:

Page 279, "Therefore from the language of the act itself and the evident purpose of Congress in passing the act and the decisions of the courts, meager and unsatisfactory as they are, we are inevitably drawn to the conclusion that this commission has no jurisdiction over the transatlantic steamship lines herein involved, even though they may be parties to a through arrangement for a continuous transportation in connection with a railroad within the United States. On foreign commerce to a non-adjacent country the jurisdiction of this commission over carriers therein engaged ends at the seaboard."

While the commission has emphatically stated that it is without jurisdiction over any water-borne commerce with foreign nations other than those adjacent, it has asserted with equal emphasis its complete authority over the entire inland portion of the through transportation of merchandise destined to foreign ports. This jurisdictional right over so much of the carriage as may be inland is based on that portion of section 1 of the act which provides as follows: The act applies ". . . to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment"

It is immaterial whether the merchandise transported originates in the state wherein is situated the port of export, or whether the merchandise has already crossed a state line; that the merchandise in question is destined to a foreign country is sufficient to give the commission jurisdiction. Machinery moving from Syracuse to New York City upon through billing to a European point comes

under the control of the federal authority rather than state authority, because it is foreign commerce. Such merchandise is within the jurisdiction of the commission from the time it starts on its initial movement, until the moment it is transhipped on board the ocean carrier; then it passes out of the purview of the commission. On this point the commission has expressed itself in unequivocal terms. In the *Cosmopolitan* case, Commissioner Lane said:

Page 281, "The federal government has said that this commission shall exercise jurisdiction over the inland portion of the haul, either to or from the foreign country." . . . "This ruling is the only one which is consistent with what seems to be the policy of the law, viz: that while restriction and control are essential as to inland carriers of foreign commerce, the ocean carriers of such commerce should remain unrestricted and free."

Just one week had elapsed after this decision was reached, when, on March 16, 1908, Mr. Justice Day, in handing down the opinion of the Supreme Court in the case of *Armour Packing Company vs. United States*, 209 U. S. 56, confirmed the correctness of the position taken by the commission. At page 78 of the opinion appears the following:

We think the language of the statute, read in the light of the manifest purpose of its passage, shows the intent of Congress to bring interstate commerce within the control of the provisions of the law up to the time of ocean shipment.

Thus the extent of the jurisdiction of the Commission with respect to foreign commerce is at last clearly defined. The commission has neither control over the merchandise after transshipment takes place, nor jurisdiction over the transoceanic carrier. Its authority terminates at the seaboard. This conclusion was reached almost simultaneously by the Interstate Commerce Commission, by the Circuit Court of Appeals, and by the Supreme Court of the United States.

III

Consequences of Incomplete Jurisdiction

From the decisions cited in Part II of this paper, it is evident that Congress must have intended that ocean commerce should be free from any restrictions whatsoever as to rebates, publicity, main-

tenance of rates and pooling. The transoceanic carriers may do every one of the things which the inland carriers are prohibited from doing. Where two millers ship flour, or two packing houses consign provisions to a European port, both pay the published inland rate in the negotiation, but as a general rule they pay different ocean rates. The two through rates enjoyed, combination or joint, as the case may be, may result in discriminatory rates between shippers, or in various preferences enjoyed by one to the disadvantage of the other. But the transportation is a through transportation. The contract is a through contract. It is an entirety.

Under former conditions, whenever a through bill of lading was involved, the steamship companies became partners with the railroads in all of the latter's evil practices. The indictments recently brought against the Southern Pacific Railway Company and the Pacific Mail Steamship Company, for rebating on foreign traffic, indicate that such partnerships may be of the present as well as of the past. Where two carriers are engaged in performing parts of the same service, no matter with how painstaking a care enforcement of the law is sought against one, if the other party to the arrangement is permitted to remain without supervision an invitation is thereby held out to continue the very evil it was intended by the law to suppress. The indivisible nature of present through transportation makes it impossible to apply one set of rules to one part of that transportation, and another set of rules to another part of it. The inland carrier may be an innocent or guilty accessory to the unfair dealings; it may be an unwilling partner to discriminations between persons, or between places: but in either event, under the present law the ocean carrier goes free. And unless the inland carrier may be brought to book, as was suggested by Commissioner Lane in the Cosmopolitan Case, the Commission is powerless to afford relief.

Under the present ruling, ocean commerce is without the jurisdiction of the Commission more fully than intrastate commerce is without the jurisdiction of the Commission.

On the supposition that certain ocean rates are liable to fluctuate, a low ocean rate may be quoted to a favored shipper in return for large inland shipments, just as a low intrastate rate may be offered as a special inducement for interstate shipments. The Commission is thus placed in the position of endeavoring to compel

one of the partners to a through contract to obey the law, while it is forced by a deficiency in the same law to ignore rebating, discriminations, and other reprehensible practices of the other partner—the very thing it was intended to prohibit.

The Interstate Commerce Commission is the guardian of American Commerce. Its mission is to prevent discrimination, to give to great and small, to the giant corporation and the humblest shipper, a fair chance in matters of transportation. But under present conditions, steamship pools largely dictate the rates, the line, the route, the method and every other condition of traffic to which the American producer, manufacturer, or shipper must submit, if he desires to introduce his merchandise to foreign consumers in other than adjacent foreign countries. What possible difference can there be from the shipper's standpoint whether the discrimination or preference be suffered at the hands of a railroad, or at the hands of a steamship company?

The Interstate Commerce Commission is also a special committee of Congress invested with inquisitorial powers, created for the purpose of collecting data by which Congress may be guided in the preparation and enactment of appropriate commercial legislation. Congress may call upon it for expert information concerning only those carriers which are within the meaning of the act. But Congress having failed to give the Commission authority over ocean carriers is unable to avail itself of the splendid ability of a highly trained body when inquiry is made concerning the conditions of trans-oceanic trade and traffic. Congress must acquire information from other sources, necessarily less competent and less reliable. Legislation suffers accordingly.

Two points may be cited as consequences of the incomplete jurisdiction of the Commission:

First.—Congress sought by law to put shippers on an equal basis. The act of 1887 is without the elasticity so necessary to meet changing conditions of trade and traffic. The abuses which the activities of the Commission have practically wiped out in the field of interstate commerce have been transferred to another field—the field of interstate-oceanic commerce. In the latter field the authority of the Commission is too limited to be effective. The old evils are renewed; the only change is that the sufferers are a

new group engaged in doing a similar business but over a larger area.

Second.—Congress, having failed to give the Commission complete jurisdiction over the enlarged business area, is without what would have proved a most reliable and fertile source of information on which to base legislation. Instead of drawing on an impartial source for information, Congress can apply only to those whose so-called vested interests may be affected. This is made more unfortunate by the fact that the greater portion of our trans-oceanic commerce is carried on by interests not American. Biased legislation has been the inevitable result.

IV

Suggested Legislation

With the growth of those fields from which our export merchandise is drawn and into which it is transported, it is presumable that there should be a corresponding amplification of the powers of the Interstate Commerce Commission, not in severity but in breadth of scope, thus enabling the Commission to keep pace not only with changing commercial conditions, but also with the rapid commercial development of the United States. Before any constructive legislation can be offered for consideration, it must be established to a certainty that it is both possible and practicable to give the Commission control over the ocean portion of through transportation.

The relation of ocean carrier to railway in through transportation is almost identical with the relation of railway to connecting railway in the same through transportation. For example, there is a conventional division of charges between all the carriers—payment for the entire transportation being made at the point of origin by the shipper to the carrier receiving the merchandise. Subsequently the proper charges due to the remaining carriers upon the route are paid over to them respectively. That the railroads and steamship companies regard each other as portions of the same route is clearly indicated in the following account, which shows the method of carrying forward and dividing transportation charges. It is to be noted that the steamship company receives its payment precisely in the same manner as does any railway carrier succeeding the carrier at the point of origin. There is a conventional divi-

Statement showing adjustment, division and final statement of total through freight (inland and ocean freight) on a shipment of 250 sacks flour (in 220 pound cotton sacks) from Alton, Ill., U. S. A., to Copenhagen, Denmark.

Inland freight.....16½ cents, Alton to Philadelphia\$90.75
 Ocean freight.....14 cents, Philadelphia to Copenhagen 77.00

Total through freight..30½ cents per 100 pounds (weight of flour,
 55,000 pounds, was prepaid in cash at
 Alton, Ill.)\$167.75

The earnings would be divided and distributed among the transportation companies as follows:

\$167.75	Alton, Ill., to Edwardsville, Ill., 2 cents per 100 pounds,	
Less 11.00	amounting to	\$11.00
	to be deducted from the total amount, and the balance	
\$156.75	(\$156.75) paid to agent of the connecting road.	
\$167.75	From Edwardsville, Ill., to Continental, O., the earnings	
Less 36.68	divided on basis of 35.9 per cent, a total of.....	\$25.68
	Total earnings on this point (\$36.68) and balance	
\$131.07	(\$131.07) paid to the agent of the next connecting road.	
\$167.75	Between Continental, O., and Buffalo, N. Y., earnings	
Less 55.18	would be based on 25.88 per cent, the local earnings....	\$18.50
	The total earnings to this point, \$55.18. This amount	
\$112.57	would be deducted and balance of charges (\$112.57)	
	paid over to the agent of the next connecting road.	
\$167.75	Between Buffalo and East Penn Junction the earnings	
Less 75.67	would be on the basis of 28.66 per cent, the local	
	earnings being	\$20.49
\$92.08	A total earnings up to this point of \$75.67. This would	
	be deducted from the total amount and the balance,	
	\$92.08, paid to the agent of the next connecting road.	
\$167.75	Between East Penn Junction and Philadelphia, earnings	
Less 90.75	would be on the basis of 9.55 per cent, local earnings..	\$6.83
	Philadelphia terminal charge	8.25
\$77.00	A total of \$15.08. This amount, plus the \$77.00 ocean	
	freight, would be placed to the credit of the agent of	
	the terminal road at Philadelphia.	
\$77.00	The railroad agent in Philadelphia would deduct the	
Balance.	freight from East Penn Junction to Philadelphia, and	
	the terminal charges at Philadelphia, amounting to-	
	gether to \$15.08, as per above, and pay over to the	
	ocean carrier balance of the total through freight and	
	charges, Alton, Ill., to Copenhagen, Denmark	\$77.00

\$167.75

sion of charges between all the carriers. Total payment for the transportation is made at the point of origin and subsequently the proper agreed-upon proportions are paid over.

The commerce clause of the constitution has given Congress power to regulate the foreign and interstate commerce of the United States. No similar authority is granted over intrastate commerce. Nevertheless the Supreme Court has said that where an intrastate carrier receives merchandise from outside that state, and such merchandise is shipped under a through bill of lading, and a conventional division of charges is made, such commerce is within the jurisdiction of the Commission.¹¹ If the authority of the Commission can thus be projected into a state where Congress can have no direct authority over interstate commerce, much more can that authority be projected over the ocean where Congress is specially authorized to regulate commerce with foreign nations. It follows as by demonstration, that when ocean carriers operate within the United States; when they enter into contracts for the carriage of through freight on through bills of lading from interior points in the United States to ports of ultimate destination; when they participate in through rates and charges,—then they become a part of a continuous line, not by consolidation, but by arrangement for a continuous carriage or shipment. When such conditions as these are present it follows that the Interstate Commerce Commission could readily be given authority to exercise the same jurisdiction over the ocean carrier as it now exercises over a carrier wholly within a state acting in a similar manner towards a connecting interstate carrier.¹² It is legally possible to give the Commission control over the ocean portion of through transportation.

Are there insurmountable practical difficulties in the way of giving the Commission control over the ocean as well as the inland portion of through traffic shipments? It may be said that to give the Commission authority worthy of the name will be to interfere unduly with the ships of foreign nations, and thus disturb international comity. Such an assertion is without foundation. It is the common practice of all nations to lay down firm and unequivocal rules with which the ships of all nations must comply before being allowed

¹¹*Social Circle Case*, 162 U. S. 184.

¹²This is now the rule with respect to the Great Lakes which are also international highways. *U. S. vs. Wood*, 145 Fed. 405.

to carry cargo from the ports of the legislating country. England, Germany, and other countries from which emigrants come to America make specific requirements as to space, ventilation, food, fire protection, etc., that must be provided before a vessel is permitted to depart with its quota of emigrants. This applies not alone to the vessels of the legislating country but also to the vessels of other nations.

The United States government exercises absolute control over the exportation of cattle from its ports.¹³ Fifty-nine regulations, applying to vessels no matter what flag they may fly, provide among many other things minute details for the feeding of the cattle, the space and location which they must have, the places in which food must be kept, the order of its use, etc.¹⁴

The ships of foreign as well as domestic owners cannot clear from our ports if there is on board a single can of lard which does not bear the stamp of the Department of Agriculture stating that it "is from animals that were free from disease and that it has been inspected and passed as sound and wholesome, as provided by law and regulation of the Department." The government of the United States forbids the ships of foreign powers to sail unless the cattle on the decks of their vessels have stanchions of a certain kind of wood, of specified dimensions, placed in such and such a manner. If all these stipulations can be carried out without a jar to international comity, it is certainly neither unnatural nor abnormal that this country should also require that these same commodities should, when the vessels of any nation are finally permitted to sail, be carried under conditions which do not produce discriminations within our borders. This is a necessary prerequisite to safeguard the freedom of intercourse, prosperity, and the general welfare. There is, therefore, precedent for giving the Commission control over the ocean portion of through transportation, and there need be no fear of thus disturbing international comity.

In order effectively to regulate foreign commerce of the United States it is not necessary for us to go into foreign countries or in

¹³See Bureau of Animal Industry, Order No. 139, and acts of Congress approved March 3, 1891; March 22, 1898; March 30, 1906.

¹⁴The minuteness of this control may be discovered by referring to Regulation 56, which provides, "that the inspector may, in case he finds that any of the fittings are worn, decayed, or defective in construction or appear to be unsound, require the same to be replaced before he authorizes the clearance of the vessel."

any way trespass upon their sovereignty. A foreign company may make whatever agreements it may please or do any acts in its own land, but when it comes to the doors of the United States and wishes to do business with our citizens, Congress has the constitutional power to require such a company to dispossess itself of all agreements and all practices that are in conflict with either the letter or spirit of our laws. Indeed, the transoceanic carrier frequently transports merchandise for a long distance on the waters of the United States. For example, merchandise shipped from Chicago to Copenhagen via Philadelphia must be carried by the ocean steamer one hundred and one miles down the Delaware River before the vessel puts to sea; or if the merchandise is shipped via Baltimore, the vessel must traverse more than one hundred and sixty miles of waters belonging to the United States. Thus a monopoly of the ocean portion of through transportation, or an ocean pool, or a discrimination may be consummated within our gates. Since the United States is sovereign over its own waters, regulation of ocean carriers can be made effective, and abuses of the sort described above can be eradicated.

Ocean carriers and inland carriers are inseparable parts of through transportation, and it is an established fact that gigantic pools and monopolies dominate trade and traffic on the high seas. That there results a large degree of control over the inland portion of through transportation by those having the mastery of the ocean cannot be doubted. It has been demonstrated that it is not only possible, but that it is practicable, to give the Interstate Commerce Commission power to supervise the ocean portion of through transportation. To this has been added the power of precedent already set. It has been shown that regulation of the ocean portion of through transportation can be supported by an effective sanction. Finally, the Interstate Commerce Commission, by virtue of its relation to inland carriers is the logical repository for any supervisory authority that may be granted for the purpose of regulating transoceanic carriers.

It is not suggested that the Commission should be given power to refuse steamship companies the right of access to the United States. No such power is contemplated. The exercise of such a power would never be endured by our own merchants or by foreign nations. But a proper extension of authority over through trans-

portation would, in no way, impinge upon foreign sovereignties. The Commission should be given the power to require any steamship company of whatever nation, doing business within the United States, to deal fairly with American exporters and importers, and with American competitors flying the flag of the United States. The Commission should be given authority to ascertain to what extent blame should be attached to a steamship company as well as a railway company for giving undue preferences. The Commission should be given authority to forbid any steamship company to discriminate within the United States between persons, places, and things. The Commission should be given authority to prevent the fulfillment of any contracts between steamship companies, the consummation of which would result in the improper pooling of traffic in the United States. Those steamship companies which might refuse to conform to the spirit and letter of our Constitution and laws should be refused the privilege to transact any business beyond our seaboard.

The Interstate Commerce Commission ought to be given practically the same general power over the ocean carrier with respect to through transportation as it now exercises over the inland carrier. Transoceanic steamship companies forming part of a through route should be required to file with the Interstate Commerce Commission rates concurred in with the trunk line railroads and associates. These line tariffs should be accessible to anyone applying at any steamship company's office. If the Commission were given power to compel the respective inland and ocean carriers to file and concur in joint through rates and follow the rates so filed, the steamship companies themselves would be greatly benefited. Rates would be less susceptible to variation, and a desirable degree of stability, now sought to be maintained by improper methods, legally accomplished. More publicity of rates would minimize the unfair conditions under which shippers of through merchandise labor, and tend to rectify other present abuses. Railway rates now filed and published stand for at least thirty days unless the Commission issues an order permitting them to be altered in a less time. This minimum period might be changed to ten days for through traffic without greatly affecting the real purpose or beneficial results of the law. As indicated heretofore, such a ten-day period would not be unjust for through traffic as applied to ocean carriers.

Steamship companies should be required to file with the Interstate Commerce Commission all contracts entered into between themselves and with the railways relative to through transportation of merchandise. Such contracts would show whether certain ports or places were suffering from discrimination. If discrimination were present the improper contract could be dissolved.

If the Interstate Commerce Commission is to accomplish fully the wise purpose for which it was created it should be given general supervisory authority over steamship companies forming a part of a through rate. Some of the benefits flowing from wise supervision which would reach both the carriers and the shippers have already been indicated. Benefits would at the same time accrue to various departments charged with the administration of government. Thus not only would carriers and shippers be put upon a fair and equal basis, but a fertile source of material, necessarily in the hands of a supervisory body, would also be readily accessible on which, among other things, to base standards of transportation costs.

The first objection, and the one advocated with greatest pertinacity, offered to this program is, that it is impossible to file with the Commission an ocean rate as part of a through rate. This contention is based upon the assumption that ocean rates are not stable, but changing from hour to hour and from day to day. No one will deny that this contention is reasonably true as to purely ocean commerce. But no one knows better than a steamship man how altogether specious is the claim that through rates are constantly fluctuating, and for the following reasons: (1) The rate at which much of our through export and import merchandise moves is now fixed annually by contracts between ocean carrier and shipper. (2) Furthermore, as already pointed out, it ordinarily takes at least from fifteen to thirty days to transport flour, provisions, oil cake, etc., from the point of origin to the seaboard. (3) The plea of necessity of offering "Fill up" rates to obtain cargo falls flat when applied to through traffic.

The plea that it is necessary to offer a low rate to a large shipper and a high rate to a small shipper in order to obtain merchandise for transportation, has been exploded so far as railways are concerned. Equality of railroad rates to shippers is to-day recognized as an accomplished fact. Why not equality of steamship rates as well? It is possible, practicable, and desirable. The railways do not chafe

under the control of the Interstate Commerce Commission. They welcome the protection and stability which obedience to the Act to Regulate Commerce affords. Their rates are open to all. Access to their services is denied to none. If the proposed extension of the Commission's power becomes an accomplished fact, the benefits now enjoyed by the railroads alone will then be equally shared by the transoceanic carrier. Transportation facilities of every sort will be denied to none and the benefits of wise legislation will be made permanent.

The most gratifying result of the commercial legislation of the United States is the fact that there is now a fair chance for the inland producer and shipper, however great or small he may be. The giant corporation cannot now crush out its humble rival through the willing or unwilling connivance of the railway. Under present conditions the giant corporation holds the same advantage over the small shipper when both are engaged in the export trade, as it did twenty years ago when both were engaged only in the domestic trade. Our laws should therefore be amended so as to bring about equality throughout the whole field of our commerce.



PART FOUR

*The State and the Nation as Units
of Control*

FEDERAL USURPATIONS

BY HON. JOHN SHARP WILLIAMS,
MEMBER OF CONGRESS FROM MISSISSIPPI.

DEVELOPMENT OF THE FEDERAL GOVERNMENT

BY HON. THEODORE E. BURTON,
MEMBER OF CONGRESS FROM OHIO.

THE NATION SHOULD SUPERINTEND ALL CARRIERS

BY HON. C. M. HOUGH,
JUDGE DISTRICT COURT OF THE UNITED STATES, NEW YORK CITY.

RAILWAY REGULATION IN TEXAS

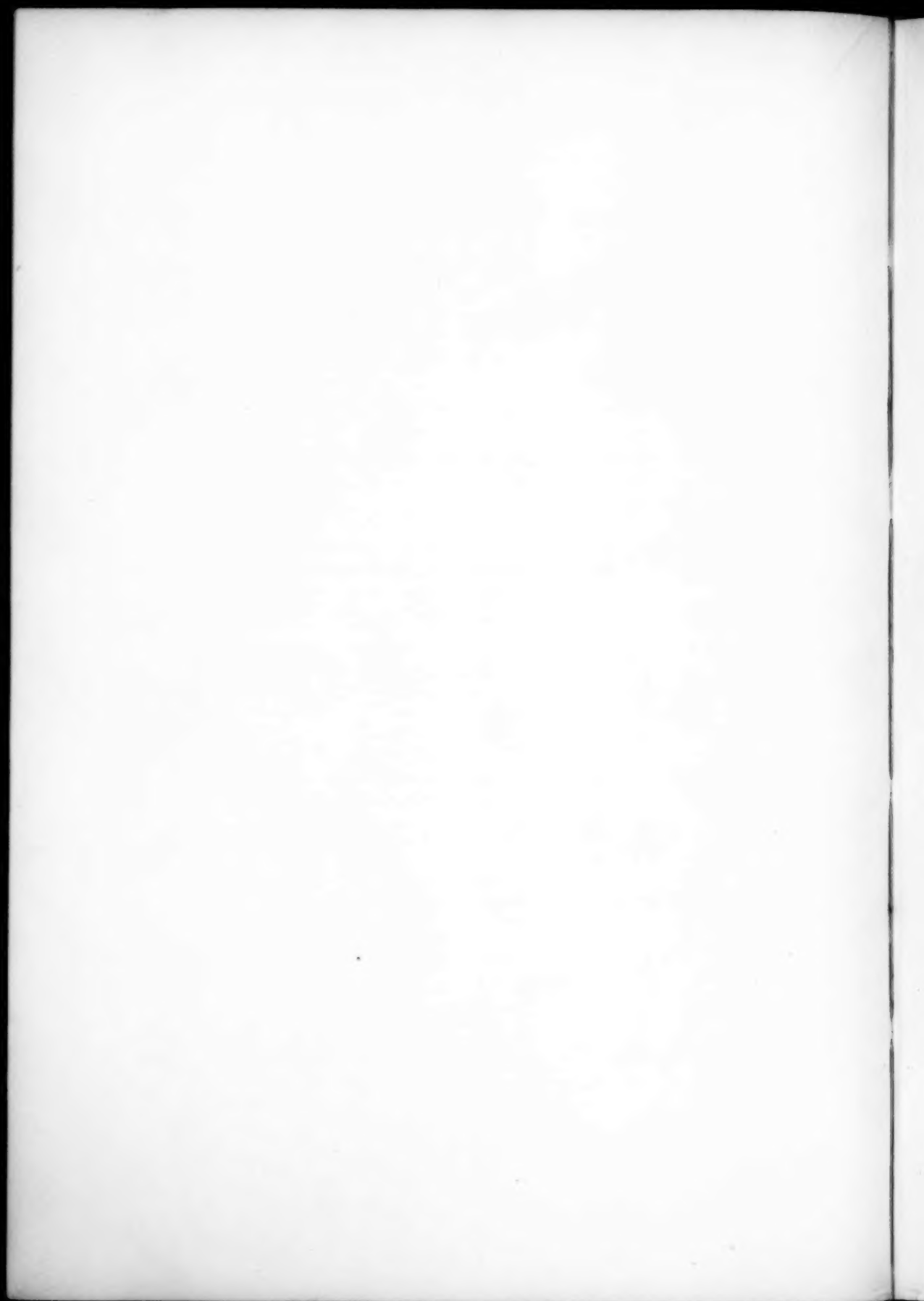
BY HON. JAMES L. SLAYDEN,
MEMBER OF CONGRESS FROM TEXAS.

CORPORATION REGULATION BY STATE AND NATION

BY HON. HENRY M. HOYT,
SOLICITOR-GENERAL OF THE UNITED STATES, WASHINGTON, D. C.

NO COMBINATION WITHOUT REGULATION

BY TALCOTT WILLIAMS, LL.D.,
PHILADELPHIA.



FEDERAL USURPATIONS

BY HON. JOHN SHARP WILLIAMS,
Member of Congress from Mississippi.

All governments, whether free or not, which have existed and fallen have fallen by weight of political machinery. There has come a time in their histories when government and its machinery was the first consideration, and man and his individuality—the support of government—the second. It is well always to keep in mind the primal fact that while government is necessary and ought to be made good, it is yet, after all, a necessary evil growing out of the vices of human nature. It is a means to an end, which end is the happiness and freedom and development of the individual man and woman; and is never an end in itself.

This idea was carried further in the formation of our federal government than in that of any other government. In a certain sense indeed the federal government is not the government of these United States at all, but is a piece of central machinery organized to hold together in union the several governments of the several United States and protect them by union from mutual aggression and from aggression by foreign powers. Federal usurpation of power is not a recent growth. It was a necessary concomitant of the rule of the old federalists. Hamilton and men of his way of thinking, delegates to the constitutional convention, strained every effort to procure a stronger, or as they would have said, a more stable government than that which was as a matter of fact reported to the people for adoption in the original constitution. Though defeated in the convention in many of their essential purposes it was but natural that when the constitution was submitted to the peoples of the respective states, that they should have become the most strenuous advocates of its adoption, because though giving birth to a government not so strong nor so centralized as they desired, it still inaugurated one very much more to their liking than the old confederation. They soon found that the objections to its adoption were not based on its being too weak a bond of union, but were precisely the contrary. They therefore neces-

sarily based their advocacy upon the plea that it did not interfere with the real rights and sovereignty of the states, within their spheres; that the states would still have such rights as were not delegated expressly or by proper implication, and in their advocacy they emphasized how little authority and power, comparatively, the new federal government would have. Notwithstanding this fact, the discontent with the constitution as it came from the hands of its framers was so great, upon the ground that it did not sufficiently safeguard the inalienable or natural rights of the individual and the reserved rights of the states, that it was adopted only upon the understanding that the first ten amendments should be added to it. They were immediately added after the adoption of the original instrument.

If you will dispassionately take up our fundamental law and study it without the first ten amendments, you will see that it would have launched into existence the least democratic of all governments now existing amongst English-speaking peoples. As originally framed, there was no express guarantee of the freedom of the press, freedom of speech, freedom of assembly, trial by jury or habeas corpus—in fact, most of the muniments that had been secured by war and legislation to the race before it crossed the Atlantic were unprotected, whether these muniments had been embodied in the habeas corpus act, in the bill of rights, or in some other instrument.

George Washington was not really a member of any political party. He had the idea that government with free institutions could be carried on without parties, and deplored their existence as factional. At the beginning of his administration this idea was his guide. Later on, after Jefferson had retired from the cabinet, and Hamilton became unrestrained adviser, the administration did take on a somewhat federalistic hue. When John Adams came in, with the real federalists in supreme power and full control, then the note of federalism in the shape of federal usurpation of power began to assert itself. The great usurpation of federal authority in the alien and sedition laws was an illustration of the legislative and executive side of the government. When Adams was retired, he left the bench in control of federalist judges, the greatest, most ingenious, as well as perhaps the most sincere of them all being John Marshall. The Dartmouth College case, in my opinion the

Illiad of all our woes, in so far as our inability properly to control corporations is concerned, and in so far as judicial construction has brought about federal usurpation, naturally followed. The decision giving the right to the federal government to establish and maintain a national bank, for which no authority could be found in the organic instrument, except by fiction of law, was another result of a federal judge's attempting to construe into it something sought in the convention to be embodied and the granting of which had been refused.

Every governmental abuse is based upon some plea or pretext, and the usurpation of power by government is generally based upon "necessity," the "tyrant's plea." This real or fancied necessity generally grows out of war. This has been especially true with regard to legislative and executive usurpations by our federal government.

Amidst the universal plaudits which he has received and deserved there are few people left ungracious enough to give sufficient emphasis to the part which Abraham Lincoln and his cabinet had in changing the spirit, if not the form, of the American government. The doctrine of "war powers" came into being, and after war had passed and peace had come the usurpations following from the exercise of the so-called war powers furnished precedents for their continuance and for other usurpations like them. It has always been said *inter arma leges silent*, there are undoubtedly certain powers which have been recognized to belong to all governments while forces are operating in the field and in the enemy's country beyond those which are conceded to the same governments at peace and at home.

During the war between the states the executive first asserted and Congress afterwards attempted to confer upon the executive the right to suspend the privilege of the writ of habeas corpus not only in the territory which was within the boundaries of the confederacy, but within the states which had remained faithful to the Union, and which did not constitute a field of war. Things went so far that the privilege of the writ of habeas corpus was suspended on the order of a lieutenant-general acting under general authority of the President. This in spite of the words of the constitution upon the subject and the uniform dicta of text books and decisions of courts.

The Secretary of War and the Secretary of State on bare orders based upon no affidavit even, much less indictment, arrested and confined men within the loyal states and spirited them off to prison. Federal marshals and police did the same thing. All this, too, prior to the act of March 3, 1863, whereby Congress attempted to confer upon the President the power and the right to suspend the writ of habeas corpus, a power vested by the constitution according to all judicial construction in Congress alone.

Men were convicted of murder and treason without a jury trial. Under a proclamation of the President amongst the classes to be thus treated were those who "magnified the resources of the enemy," those "inflaming party spirit among ourselves." It seems almost incredible now to believe that men could have been taken out of their beds at night and carried away to prison, without even affidavits, by ignorant marshals who determined for themselves the question whether or not those seized and imprisoned were guilty of disloyalty, especially when disloyalty was defined in such vague terms as "magnifying the resources of the enemy," "underrating our own," or "inflaming party spirit amongst ourselves."

In December, 1866, in the case of *ex parte Milligan*,¹ the Supreme Court pronounced the proclamations of the President unconstitutional and the act of Congress so, except when "confined to the locality of actual war," and not elsewhere, and to places "where the courts are not open."

There are those who believe that the branch of the government most guilty in the field of federal usurpation is the judiciary. This is not true. Upon the whole the courts have been a bulwark of protection for the natural rights of the individual and the reserved rights of the states. Judicial usurpations, which have been successfully accomplished have not been a tithe of those which have been unsuccessfully attempted by the federal legislature and the federal executive. The Ku Klux act which would have carried the federal authority into every man's home within the states in the enforcement of criminal law, the civil rights act, which usurped to the general government nearly all of the police powers of a state, and the control of the social affairs of the citizen, are illustrations of attempted federal usurpations set aside by the court.

During the period immediately after the war between the states

¹ 4 Wallace, 2.

Congress fought most viciously against the courts, frequently taking away from them jurisdiction on the subject matter, or attempting by acts of Congress, and sometimes successfully to prevent appeals to the Supreme Court of the United States. A book might be written, and a very interesting one too, upon usurpations flowing out of the Civil War and out of the supposed "necessities" of a reconstruction of the Southern States. Some of the usurpations that owe their real existence to the Civil War still remain to plague us, for example, the legal tender case. The constitution deprived the states of the power to emit letters of credit and issue paper currency, a power which was inherent in their sovereignty, but which had been found to be greatly abused. Hamilton himself contended that not only was this power not granted to the federal government, but that in spirit it was prohibited to it. Nobody ever did or does now doubt the right of the government to issue a note as evidence of indebtedness when it has not the money wherewith to pay. But nobody up to the Civil War had ever, for one moment, dreamed that the government had a right to levy a forced loan upon the people by making its notes a legal tender for the payment of debt. This legacy is not justly attributable to the judiciary, but to the President and the Senate.

You are familiar with the manner in which this result was arrived at. After a first decision by the court declaring the legal tender act unconstitutional, the addition of a new judge to the number on the bench and the appointment of another judge to fill a vacancy on the old bench caused by death accomplished a reversal. It requires no imagination, but a plain view of the field only, to realize what an immense capitalistic and centralizing influence the judicial construction into the constitution of this power which was never granted, to wit, the power to make of government notes a legal tender to take the place of gold and silver has vested in the federal government.

John Marshall in the case of *McCullough* against Maryland had early in the history of the country upheld the power of the federal government to charter a national bank of issue, although a proposition in the constitutional convention to confer such power had been expressly offered and expressly voted down. The opinion in the case upheld the bank as a "fiscal agency" of the government, and as such it was declared that it could not be taxed by a

state, because such power of taxation would carry with it to one sovereignty the power to destroy the fiscal agencies of another. And yet long afterwards when the law to establish the present national banking system in order to strengthen the credit of the government and increase the price of its bonds, carried a provision to tax note issues by state banks 10 per cent (it being admitted that this tax was levied not for the purpose of revenue, but for the purpose of stamping state bank issues out of existence), the court cavalierly flung aside the doctrine that one sovereignty could not tax out of existence the chartered instrumentalities of another, and held, in substance, when it sustained the constitutionality of the 10 per cent tax, that it could. The power to issue "money" directly in the shape of legal tender treasury notes, the power to confine the function of bank note issuance to national banks and to monopolize their regulation have together given to the federal government that power and influence over finance and business which makes other usurpations, whenever all three branches of the federal government are desirous of them, irresistible by the states or by the people thereof.

The early assertion by Congress of the power to levy import duties not simply as taxes for raising revenue, but for the admitted purpose of hothousing into prosperity at the common expense such industries as in the opinion of Congress it is for the common interest and general welfare to hothouse, has given a whip handle, if not a mastery, over the manufacturing interests of the country to the federal government. The usurped control of finance and of manufactures, together with the immense powers actually vested by the constitution itself in the federal government, under the treaty clause and under the interstate commerce clause, have made a government stronger than any that Hamilton and his compeers ever dared attempt to inaugurate in the constitutional convention—stronger than any that Marshall ever dreamed of construing, or wanted to construe, into existence.

This is true when you consider the real power of Congress under the interstate commerce clause, when it is exercised honestly and genuinely for the sole constitutional purpose of the regulation of interstate commerce. When you consider that this power has been abused as a means to accomplish ends not contemplated by it, this conclusion is stronger. Consider the full effect of the lottery

cases and the oleomargarine cases carried out to their logical results as precedents for future legislation and judicial decisions.

What has been actually accomplished by legislation regulating, or pretending to regulate, interstate commerce, is as nothing compared with what is proposed. A brilliant young Senator from Indiana proposes to control child labor within the state through the interstate commerce clause by denying to products manufactured within a state interstate passage, when produced by child labor, though employed in accordance with the laws of the state of their manufacture. If Congress has power to do this it has power also to say that no products shall be carried in interstate commerce, if produced where labor is employed for longer than eight hours a day. If it has a right to do either, it has a right to say that no man or woman shall travel upon an interstate ticket who has been divorced according to state divorce laws which do not meet with the approbation of Congress.

Early in the history of the country the House of Representatives sent to the Senate a bill to regulate and work certain copper mines in New Jersey—I believe it was, if my recollection is correct—and Mr. Jefferson, in his playful but philosophical manner, said that their method of deriving this power from the constitution was about this: "Congress has a right to provide for the common defense; ships are necessary for the common defense; copper is necessary to finish ships; mines are necessary to be worked in order to get copper, and, therefore, Congress has a right to work mines within the states," and he added that anybody who had ever followed the reasoning in "The House that Jack Built" could readily understand and be convinced by the force of the argument.

We are told now that water is necessary for interstate commerce; that erosion of hillsides and mountains fills up the water courses; that deforestation leads to erosion; that reforestation will stop erosion, and that, therefore, under the interstate commerce clause, Congress has a right to enter into the states, with or without their consent, buy up all the mountain sides, and turn them into public forests, an argument probably logical, but very attenuated.

By parity of reasoning Congress might enact a force bill under the interstate commerce clause basing it upon the right of Congress to say what should or should not enter into interstate commerce as freight or as passengers. It might, therefore, say that any man

elected to Congress, unless elected in accordance with a certain law passed by Congress, should not be permitted to travel in interstate commerce, and therefore should not be permitted to leave his state and come to Washington to take his seat as a representative. I know, of course, that the *reductio ad absurdum* is not the safest of argument, but it sometimes makes things ridiculously clear.

Add to all this power over finance, banking, commerce, manufacture, the immense spread of the activities of the Department of Agriculture. It is furnishing seed to the farmers, it has established a stock farm in one of the states for the purpose of breeding "a standard national horse," and the right of entering into a state, with or without its consent, and constructing roads not only between the states but within the states is being almost asserted. With construction will come the assertion of the right to control, if not to police such roads.

The undoubted right of Congress so to regulate interstate commerce as to stop the spread of disease amongst men, animals or plants is being driven to its utmost, and will be driven beyond its utmost, legitimate application. That the operations of the great Department of Agriculture are beneficent there can be no doubt. The few millions appropriated each year for that department accomplish more good than ten times as many millions appropriated for other purposes. But it does not follow that because a given work is wise and beneficent that the federal government has the right, or ought even by amendment to be given the right to do it, nor does it follow that because the federal government does beneficently carry it on that it could not have been carried on quite as beneficently by the states, if the federal government had stayed out of the business. In connection with agriculture, for example, I, for one, believe that if the federal government had never undertaken to do anything at all with it the general condition of agriculture in the country would yet have been quite as good as it is, perhaps better, because then the states would have established magnificent agricultural departments with experimental stations, training schools and all that; would have vied with one another from New York to California in doing the work, each actuated by the motive of excelling others in the prosperity brought by improving the basic art. The department wants the federal government to go further and to inaugurate and maintain in the state technical, agricultural

and manual training schools, with what measure of federal control it has not thus far seen fit to indicate.

Take as the next illustration the gradual assumption of power to the federal government in connection with works of irrigation. That Congress has a right to irrigate the public lands so as to make them valuable, and enable them to be sold so that the money thus placed in the treasury as the proceeds of otherwise worthless lands may inure to the interests of all the people, there can be no doubt. Growing out of this right Congress has taken hold of the work of irrigation everywhere on private lands as well as on public domain. It has added to that the kindred subject of drainage, because undoubtedly if Congress has power to put water on lands outside of the public domain it has an equal power to take water off of lands outside of the public domain. The departmental work does not seem to have received even a momentary check from the decision of the Supreme Court in the great case of *Kansas against Colorado*, in 206 U. S., where the court says that "no one of them" (to wit, the enumerated grants of power and authority to Congress in the constitution) "by implication refers to reclamation of arid lands."

In some cases where Congress has usurped power and where the courts have subsequently set aside the acts of Congress as unconstitutional the wrongs perpetrated under the act have been perpetuated. The *Captured and Abandoned Property Act* is an instance in point. After the general amnesty proclamation of the President it became evident that the money lying in the treasury from the sale of captured and abandoned property would have to be restored to the Southern people who had owned it. A rider on an appropriation bill of July 12, 1870, undertook to annul, and Congress, by refusing to appropriate the money out of the treasury practically has annulled the subsequent decisions of the court upon this subject. Millions of dollars are now lying in the treasury accumulated there under this act of Congress which the court subsequently held to be a special fund owned by the owners of the property. There is no way of getting it out however, because, as the court properly says, it requires an act of Congress to appropriate money once covered into the treasury. Here is a case where federal legislation has been adjudged invalid and unconstitutional, and yet where the people injured by the usurpation have

suffered the effect of it, until they died, and their heirs or assigns are suffering the deprivation yet. The money in the treasury derived from the cotton tax and still kept there is another instance in point.

I have referred to the war between the states as a source of much federal usurpation. The Spanish-American War might be referred to in the same connection. The Constitution of the United States provides for the separation of the judicial, executive and legislative functions. In the Panama zone, the executive alone has been and is exercising not only executive but judicial and legislative functions. When a resolution was introduced into Congress, and passed by it, asking under what authority of law the President was doing this, the answer came that it was under authority of certain acts of Congress, their dates being recited, and under a treaty with the so-called Republic of Panama, as if either an act of Congress or a treaty could confer upon the executive the right to exercise judicial or legislative powers, in the teeth of an express constitutional prohibition of their consolidation.

Our experiments with schemes of crown colonialism in the Philippines now, and for a while in Porto Rico, were so stupendously alien to the spirit of all of our institutions as to be at once horrible and amusing. Department law clerks sent out as proconsuls are learning in the Philippines and in Cuba to-day lessons which will return to plague the republic at home. You need not expect that what is learned there will be forgotten here. In Rome the Emperor was first a field officer in Gaul or Asia—in the enemy's country or in conquered countries. Then there came the exercise of powers as Emperor in Rome itself. Marius and Sulla, as well as Julius Cæsar, were virtually emperors long before Augustus Cæsar had founded what we now call the Roman Empire.

Peace is important to all peoples. I sometimes think that two-thirds of the energies of all the statesmanship in the world might be profitably employed in the maintenance of peace throughout the world. But, if important to other peoples, it is doubly so to us with our peculiar dual government, the balance of which is so nicely adjusted and so vital, and which is always shaken by the *sequelæ* of war. We never know beforehand what these *sequelæ* are going to be. You hear much of "the horrors of war." The greatest of all these horrors is the murder of local self-government, the only possible field of development for individual manhood.

The spirit of crown colonialism will be found to be contagious. Accustomed to it in all its spirit in our daily administration of colonial affairs, the public will gradually become accustomed to the insidious introduction of its features at home. No free government can successfully control alien and unassimilable peoples except by the violation of the fundamental principles of free government itself. Our forefathers recognized this when they placed the Indian tribes on a footing with foreigners, to be dealt with by treaty. The mailed fist, well exercised to its task, is dangerous ultimately to liberty of citizens much more than it is even to subject peoples. The system will some day drag down England herself to the exhaustion of her sons and her revenues in maintaining her hold upon India. The inauguration of the system by us in the Philippine Islands, unless once we have the good sense to put the people of the archipelago upon their own feet, teach them to stand alone and leave then standing afterwards, will have the same effect on us in the long run. The Philippines are even now furnishing the excuse of great armaments, naval and military, and they constitute to-day the one point of unnecessary and unnatural contact out of which great wars may, if not must, ensue.

These federal usurpations are going on not only through the executive, and the legislative, but—insidiously, gradually, unmarked,—they are going on through the administrative branches of the government. Charles I lost his head, and James II his throne, because of executive and administrative suspensions of acts of Parliament. The American people have become so accustomed to the suspension of laws by mere non-enforcement by the executive, or some obscure bureaucrat under the executive, that you perhaps could not excite real alarm in the minds of five men by a full recital of them all.

Mr. Shaw, while Secretary of the Treasury, took money already covered into the treasury, and under the guise of depositing it virtually loaned it to such banks as he chose without interest. This, notwithstanding article I, section 9, clause 7, of the constitution, which reads: "No money shall be drawn from the treasury, but in consequence of appropriations made by law." The same Secretary of the Treasury quietly construed the disjunctive "or" in a law passed by the Congress to have the meaning of the conjunctive "and," so that when Congress had by law said that

those receiving deposits of public money—not deposits of money already covered into the treasury, remember—but deposits of money collected from internal revenue and not yet covered into the treasury—should deposit as security United States bonds “and” other bonds, that it means “or” other bonds. Upon this he quietly issued a ukase to the effect that he would receive such securities as complied with the savings banks laws of New York and Massachusetts, and would dispense with the deposit of United States bonds altogether in his discretion.

The discussions in Congress at the time that the law under whose alleged authority he acted was passed show the reasons for the original act. People forget now that there was a time when United States bonds were not at par. It was wise, therefore, upon the part of Congress to provide that the Secretary might require other security as *additional* to that of national bonds in order that the security might always be equal in par value to the money loaned. I need not dwell upon the total torturing of the original meaning by the Secretary's decision. Secretary Cortelyou ruled later on that under the provisions of a law permitting the issuance of treasury certificates “when necessary to meet public expenditures,” he was enabled to issue certificates to get money in order to help the banks by free loans in a panic.

An administrative board of the United States, engaged in the business apparently of seeing that due “protection” is rendered to “American industries,” and finding that there was no tariff on frog legs which were being imported into our territory, to the detriment of the great “American industry” of bullfrog raising, gravely ruled that they were taxable under the provision which put an import duty upon dressed poultry.

What has been accomplished in the way of federal usurpation by the national legislature and executive, and set aside by judicial authority, or left to stand and stay to plague us yet, does not constitute a tithe of what we are to expect, if some recent utterances by great and popular men are to be taken at their face value.

The President, in his Harrisburg speech, delivered in the month of October, 1906, says: “In some cases this governmental action must be exercised by the states. In others it has become increasingly evident that no sufficient state action is possible and that we *need* through *executive action*, through legislation and through

judicial interpretation and construction, to increase the power of the federal government. If we fail thus to increase it we show our impotency."

Mark the language. "We need"—that is the old familiar tyrant's plea of necessity—to do what? To increase the power of the federal government. The very verb "increase" is the President's word, and is a confession that the federal government does not now possess the powers desired to be annexed—a confession of deliberately contemplated usurpation. And to do it how? Not by amending the constitution, even though we had to amend the amendatory clause in order to make the work of amendment easier. But by "executive action," by "legislation," both of them necessarily, if there be an *increase* of power, violative of the constitutional limitations upon executive action, and upon federal legislation. It cannot be too often repeated that this is true, or else the word "increase" would not have needed to be used. And third, and more insidiously still, "through judicial interpretation and construction"—by the soul of all insidious revolution! Mark the words well in your memories.

Secretary Root, in his New York speech in December, 1906, evidently following up a deliberately laid scheme by supplementing the President's speech in Harrisburg in October of that year, uses this language: "Sooner or later constructions *will be found to vest* power where it will be exercised in the national government." Secretary Root is a lawyer. He knows what the verb "vest" means. Vest means to give, to deposit a new power, not merely to apply an existing one to new conditions. His language is, to "vest power." His ground and excuse and reason for "vesting" it is that it must be "placed"—placed, mark you—where it will be exercised. The necessary inference is that it is now vested in the states, and that they ought to be divested of it, because they do not exercise it. His method of vesting power again is like the President's—not by amendment to the constitution, whereby the people themselves can redistribute the powers which are theirs and which they originally distributed between our dual sovereignties, but "by constructions" which are to be "found." Found by whom? By the very men who are to exercise the power construed into being or "found."

An American citizen does not take an oath of allegiance to

any government. His oath of allegiance is to the constitution. Every officer who serves the federal government, from the President down, whether he be cabinet officer, judge, senator or representative, takes this oath. It is now proposed that the officers of the federal government shall vest power in themselves by construction and that they shall increase their power through executive action. Think of it! And yet in all the land no hint or suggestion of impeachment.

This method of amending the constitution does not require a two-thirds majority in each house, nor three-fourths of the states in confirmation of it. It is easy. It requires nothing but momentary forgetfulness of an oath registered in the chancel of God. It is not a personally dangerous thing to attempt or to do. It may perhaps even be applauded.

What is more, the President proposes to "make good"—a phrase he is fond of. I have no time to refer to all the circumstantial evidence, but run over in your minds our recent history: Root's part in it in the Philippines; the acts of our proconsular agent in Cuba, this proconsular agent having been a law clerk in Washington; the present condition of things in the canal zone, and the frequent chidings by the President of the courts where they do not decide to suit him, showing a purpose of bending and warping the personnel of the supreme and other federal courts to an incorporation of his policies by judicial construction as a part of the authority of the federal government. No lawyer not entertaining an opinion favorable to these policies can go upon the bench unless he succeeds in fooling the President, or unless the President fools himself, as to such lawyer's legal opinions. Daniel Webster was right when he said that: "the judicial power cannot stand for a long time against the executive power." The President has already during his tenure of office appointed one-third of the Supreme Court and over one-half of the subordinate federal judges.

Judges on the district and circuit bench, although they hold their offices during good behavior, feel ambition like other men and would like to fill vacancies upon the supreme bench as they arise. They can furnish no course better calculated to bring about that result than to let it be known by their decisions as subordinate judges that they share the President's opinions, and among others, perhaps chiefly, his opinion of the rightfulness of "increasing" federal power "by construction."

The difficulty of amending the constitution is the excuse at heart for most federal usurpations, this with, and even more than, the alleged "inaction of the states." It was well that at the beginning the practice of amendment should have been made extremely difficult. The important thing was to put the government upon its feet and teach it to march, as the French say; to stop experiments with the framework until the people had become accustomed to it. We have reached the point now where there are many amendments that ought to be made to the organic law, first, because they are highly beneficent in themselves; secondly, because we want to do away with this excuse and pretext of usurping power in order "to do good." It has been said that the federal constitution cannot be amended except as the result of some great cataclysm, or foreign or civil war. This is a mistaken statement, but it is true that it is very difficult indeed, to amend it, so difficult as to be, under ordinary circumstances, almost impossible. If you have a system which is too difficult of legitimate change you thereby invite illegitimate change or usurpation.

The first clause in the constitution that ought to be amended is the amendatory clause itself. The practice of amending the constitution ought to be a difficult one, but not so difficult as it is now. It would seem that to require a majority of ten per cent, over one-half in each house, voting for two Congresses in succession to submit an amendment, would be a requirement sufficiently difficult in the initiative. This would require at present 51 senators and 215 congressmen, and as that vote would be required in two successive Congresses, the scheme would give the people an opportunity to pass upon the proposed amendments tentatively when they came to elect the first Congress after the proposal of the amendment. If to this it were added that the proposed amendments should not become a part of the fundamental law unless they had been adopted both by a majority of the people and by a majority of the states, the practice of amendment would not be rendered so easy as to lead to many propositions of amendment, and still would be made easy enough to encourage a hope upon the part of those who wish to preserve our institutions that they would not be destroyed by the very organic difficulty of changing them.

It is not, however,—note ye well,—in this way that either President or Secretary proposes to go about the introduction of

reforms, or a redistribution of governmental powers. It is not proposed that it shall be done deliberately by amendment upon the initiative of the national legislature and upon the confirmation of the people in the states, but that powers are to be "vested" in the federal government and that federal powers are to be "increased" by "constructions" which are "to be found" or "by executive action" and "by legislative action" and by a judicial reading into the instrument of that which is confessed by the very language used not to have been written into it. There has been a recrudescence of federalism here lately, alarming in its proportions. We begin to hear a great deal once more about "inherent powers" "powers ordinarily exercised by sovereign nations," and therefore as is claimed to be exercised by the federal government. The President talks about court decisions which have left "vacancies," "blanks" between federal and state powers, and wants these vacancies and blanks filled, occupied, "by executive action," "by legislative action" and "by judicial construction." No decision of any court could possibly have ever left a blank or a vacancy between the powers to be exercised by the federal government and the powers to be exercised by the states. The moment the court decides that a given power is not one of those granted to the federal government, either expressly or by proper and honest implication, that moment the court has decided *e converso* that it is a power reserved in the states by virtue of the eleventh amendment, is in other words one of the powers not delegated but reserved to the states "or to the people." What can be of more "national concernment" than murder, theft, insanity? Yet no one would contend that the federal government was granted the power to legislate to punish them within the states.

Much has been written about what is meant by the phrase "or to the people." In my mind it is clear—the powers not delegated are reserved either to the states or "to the people" *for redistribution* as they may choose by amendment of the constitution. Both state and federal governments are their servants, not their masters. The people of the United States, acting within their respective states, have the right of distribution of governmental power. Again, individuals also have certain natural and inalienable rights, to which reference is likewise made in the phrase—these are by nature reserved to the people as rights not to be touched by state or by

federal government—by any governmental or political agency whatsoever. That man does not understand the nature of American institutions who thinks that arbitrary and unlimited power is vested anywhere under our system, even in a majority of the people themselves acting through any government or by themselves. There are things which under our system a majority cannot do, whether they are in their opinion right to be done or not. Thus high was the sacredness of individuality held by our forefathers.

I was talking a moment ago about the influence of the executive over the judiciary. I quoted Daniel Webster to the effect that the judiciary could not stand long against the influence of the executive, and yet the spirit of the times is such that it has been gravely proposed in a bill introduced in the House to make this influence still greater. That bill, introduced on January 4, 1907, provides that the President "whenever in his judgment the public welfare will be promoted by the retirement of a judge" may retire him, "with the advice and consent of the Senate," and appoint somebody else, who shall take his place. This would give to the President and the Senate of the United States absolute control over the judiciary.

Our executive department has carried the Root doctrine into its dealings with Congress. Where Congress will not enact legislation that the executive wants, some administrative department construes it to exist, as was the case in the graded age pension ukase issued by the commissioner of pensions. A bill had been pending in Congress to accomplish the precise result. Congress would not pass it. The executive, through the commissioner of pensions, amid popular applause, construed it into existence.

When, later, it was proposed upon a general appropriation bill to insert a clause enacting into law the graded pension system thus promulgated, the point of order was raised that the motion could not be entertained by the House when a general appropriation bill was under consideration, because it was "contrary to existing law." In other words, that the amendment containing the very language of the ruling of the commissioner of pensions was a change of existing law. This point of order was sustained. Sustaining it was an admission of the fact that the executive order had promulgated a new law—that a branch of the executive had legislated. If, on the contrary, the point of order had not been sustained, then the very fact of the adoption of the amendment

would have been a confession of the fact that Congress needed to act in order to make good that which by executive order had been promulgated.

A treaty with Santo Domingo was pending before the Senate of the United States, which the Senate for a long time refused to confirm. The executive, being determined to have its own way, Senate or no Senate, did, as a historical fact, for two years before the ratification of the treaty by the Senate, execute the terms of the treaty.

The President at one time had a nomination of a certain South Carolina negro named Crum pending in the Senate, and the session came to an end without action on it. Thereupon an extraordinary session having been called to begin at 12 o'clock on the very day upon which the former session expired, Secretary Root and the President, between them, construed into existence what they called "a constructive recess." That is, that between the beginning of 12 o'clock meridian and the end of the same 12 o'clock meridian on a given day "there had been a recess," and this being the case the President had a right to reappoint this proposed appointee during this so-called recess. He *did* reappoint him thus contrary to law and the Senate was subsequently coerced or persuaded to confirm him.

The logical inconsistency of public opinion in America was never better shown than with regard to this incident. The President's construction into existence of a constructive recess for the purpose of saving his right of appointment aroused no indignation, although it was the act of one man. He had, however, set a precedent which soon found imitators. If there had been a recess, then members of Congress were entitled to mileage for the recess rather for the new session following it. They, therefore, very logically, according to the precedent set by the executive (although, of course, very wrongfully, but no more wrongfully than the President) and voted themselves mileage for the "recess." A storm of disapprobation from the throats of the people and the columns of the newspapers swelled to heaven. The Senate voted the extra mileage out and President, people and all "congratulated the country." The man who imagined the iniquitous thing and acted upon it secured the result that he aimed at and was little, if at all, criticised. The very Senate that voted extra mileage out of the law upon the ground

that there had been no constructive recess, finally confirmed the appointee whom the President had hurled back at them upon the theory that there had been a constructive recess.

Franklin Pierce, in a recent book that ought to be taught in every school and college where civil government is taught, a book entitled "Federal Usurpation," from which I have drawn much for this speech, says: "Social evolution progresses actually with the importance of the citizen over the state and decreases in the proportion of the importance of the state over the people." All these propositions of adding to the powers of government by "executive action" and "legislative action" and "judicial construction" and "constructions to be found" leave that great truth out of sight. I know of no people who have too little government. We do not want an America like Sparta, where the state was all and man was nothing. We want no Rome even, where responsibility was so entirely devolved upon government that when government itself grew weak there was no initiative left among the people even to resist invasion,—a herd of helpless sheep, they were.

Our weight of political machinery is increasing all the time. Not many years ago there were about two hundred special agents and detectives in the employ of the government. There are over three thousand now, going around hunting up by detective methods violations of federal statutes. A detective is like an expert in the medical profession. He generally finds what he is seeking. God never made a throat or nose to suit a throat and nose expert; he never made a pair of eyes to suit an eye specialist. The Department of Justice uses a great many of these detectives. When you begin to inquire under what authority of law, it is difficult to procure an answer. That department seems to borrow them from the Treasury Department. In other words, they are detailed from the Treasury Department to do work for the Department of Justice. The law appropriating for them in the Treasury Department appropriates for them for the expressed and sole purposes of ferreting out and procuring punishment of counterfeiters and violators of the internal revenue laws. They are being used for a hundred other purposes—peonage is the immediate fad—public land stealing was a few months back. In so far as special agents are being used for the purpose of investigating trusts and bringing them to book, there is authority of law independently.

Judge George Gray well says in a recent speech that: "In Rome when a dictator was appointed, his instructions were 'to take care that the state receive no harm.'" This was a pretty broad authority. Mr. Bryce, the author of "The American Commonwealth," seems to think from what he says that our Presidents in times of acute peril may or must, act on a like instruction. The present President does not seem to think that it is necessary to wait for a time of acute peril, but that the instruction is good "for any old time."

When the New York Constitutional Convention adopted the Constitution of the United States, it adopted it with the proviso that there should be no extension of power "by legal fiction." This was to prevent usurpation of federal power by construction. How far the power of legal fiction may carry a system of laws may be realized when it is remembered that from the twelve tables of ancient Rome there grew up by construction and legal fiction the *corpus juris civilis*, and from a lot of old customs there grew up by court precedents nearly all of the body of what we call our "common law."

The only restraint that we have upon executive usurpation is either judicial constraint or impeachment, and the only restraint that we have upon judicial usurpation by construction is the power of impeachment by the House of Representatives before the Senate acting as a grand court of impeachment. It requires two-thirds of the Senators to convict and the sole penalty is deprivation of office. The process is surely difficult enough at best and the penalty light enough. The Swain case, however, shows to what extent we have gone in limiting that power. Federal judges are chosen, to use the words of the constitution, "during good behavior." It would seem that their independence is sufficiently protected by this tenure and the difficulty of obtaining a verdict of removal by two-thirds of the Senate. But if we are to learn any lessons from the Swain case at all, the phrase, "during good behavior," has been construed to mean "during life, except when the judge has violated the express provisions of a penal statute." The power of impeachment was given to protect the people from "high crimes." They are necessarily indefinable. What higher crime can there be than treason? What greater treason than treason to the constitution, our sole sovereign, to whom alone we swear allegiance? What greater treason

than the terrible attempt by a judge to destroy the integrity of the organic law by construction, with deliberate intent to make law or to increase federal power? Yet our President and his chief secretary encourage this very form of treason, insidious and horrible, and there neither is nor can be any penal statute against it.

Do not misunderstand me. There is a difference between these latest day propositions and the application of an undoubtedly granted power to a new condition. If the federal government had been granted expressly or by fair and honest implication power over a given subject matter, no change of phrase in that subject matter can balk the application of the power. The power over interstate commerce, for example, could not be limited because human invention had brought into existence steam railways as instrumentalities of commerce. But it remains true that in construing the organic law the duty of the judge lies in holding to the old maxim, "*Ita lex scripta.*" Nor is it necessary to enter into the formerly mooted question as to whether this construction should be narrow or broad, strict or liberal. What we want is an honest and sincere construction of the real words and the real intent and the real purpose "nought extenuating nor setting down aught in malice." Otherwise construers of law become makers of law—judges become legislators.

I am one of those who believe that infinite damage has been done by the study and popularity of Hon. James Bryce's book, "The American Commonwealth." It is almost impossible for an Englishman to understand our system based upon the underlying theory of a written constitution. The Constitution of Great Britain is a thing of construction, or evolution, of growth by judicial construction,—growth by changing opinion. Parliament has unlimited power, subject to certain fundamental natural rights of the individual which, broadly stated, are "the inherited rights of free-born Englishmen." Mr. Bryce, therefore, in dwelling with apparent pleasure upon the fact that the Constitution of the United States might be changed by judicial construction (changed now, mark you, not developed) was acting very naturally for one of his environment and training. He could not appreciate the horror in the mind of a real American,—really in love with the institutions of his own country,—for the very thing which he dwells upon with a tolerant, if not a favorable eye.

I shall not say much more, however, about judicial usurpation, because there has not been as much usurpation by that branch of the government, either attempted or consummated, as by the other two. Upon the whole, our judiciary has rather preserved the constitution from popular passion and impulses, from party spirit and sectional hate, and as Congress and the executive grow wilder, it sets aside from year to year a larger and larger proportion of their acts. During the entire period before the Civil War it had set aside only two or three general acts. Just how many multiples of that number have been declared unconstitutional since I cannot now say, but we have grown accustomed to the Supreme Court's checking up Congress and the President every now and then, and the prayer of every good American is that it may do so "more and more unto the perfect day."

Yet the judiciary has made some apparently queer decisions lately. In *Mankichi's* case, which came up from Hawaii, there had been no indictment nor any unanimous verdict of twelve men—in our constitutional sense a jury verdict—against the prisoner, and yet the Supreme Court affirmed the case upon the ground that the laws of Hawaii when annexed to the United States had not required an indictment and had made provision for a jury that did not find a verdict by unanimity. Upon what principle the court arrogated to itself the right to say just what fundamental constitutional principles should go with the constitution to Hawaii simultaneously with the annexation, and which of those fundamental notions should remain behind, to go later or not at all, presents a curious study.

The gradual growth of injunctions in federal courts constitutes the chief thing to complain of in connection with that branch of our government. Originally the equitable right of injunction was issued when the law remedy was inadequate or the damage irreparable and did not apply to crimes. In *Lennon's* case,² however, men were actually enjoined for refusing to haul cars of a railroad and for leaving the employ of a railroad, while under the charge of a receiver appointed by a federal court, on the ground that their quitting the employment "crippled the railroad's operation," and I believe, if I remember correctly, also upon the ground that it interfered with interstate commerce. This injunction was issued in

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spite of the thirteenth amendment, which forbids "involuntary servitude except for crime."

If everything that can be construed to be an interference with interstate commerce is to be taken as a just ground for an injunction, a man who shoots another riding on a ticket from Philadelphia to New Orleans would, so far as I can see, subject himself to federal penalties instead of being simply tried for murder, according to the laws of the state of the place where he committed the murder. Even when United States penal statutes exist, where a man can be arrested upon affidavit and rendered harmless, the federal courts still issue injunctions.

The power to inflict punishment for indirect contempts,—constructive contempts,—contempts committed not in view of the court, punishments which carry deprivation of liberty and deprivation of property without a jury trial is another abuse. These things encourage a spirit of anarchy. Every man, if possible, ought to have a trial by jury. Injunctions are issued by one judge on *ex parte* hearing, on mere affidavits without notice even to the defendant and on reference of questions of fact to one referee. Upon such evidence as that and upon such findings of fact as that the enforcement of state laws, passed deliberately by state legislatures and approved by state executives, is enjoined. The plea generally is that the state law is "confiscatory." Of course when upon a hearing properly had after due notice to both sides, and a proper investigation of the facts, state legislation is found to be really confiscatory, it must be set aside by permanent injunction as conflicting with the Constitution of the United States. But that is not the question here. The question is whether the temporary restraining order issued *ex parte* upon mere affidavits and so-called ascertainment of fact by a master in chancery, very little acquainted with the subject matter and very little able to judge of it, should prevail, to annul a state statute.

Let us notice a tendency to usurp federal power under the treaty clause. Calhoun says that treaties are the supreme law of the land "provided such regulations (in treaties) are not inconsistent with the constitution." I quote Calhoun because he went further than almost anybody in maintaining the plenary power of the federal government to regulate our intercourse with foreign powers. If the treaty attempt to treat concerning some subject

matter, the regulation of which is not delegated to any branch whatsoever of the federal government, then that treaty is "inconsistent with the constitution," as being inconsistent with the purpose for which the federal government was formed. If it attempt to treat of some subject matter the regulation of which is delegated to any branch, I care not which one, of the federal government, I admit the plenary power of the federal government. That the treaty can give an alien equal rights with the citizen, even within a state concerning a subject matter that the federal government would otherwise not control, I do not doubt; but that it can give him superior privileges to a citizen I deny. If by treaty with Japan, for example, California can be forced to admit Japanese, or by treaty with China it can be forced to admit Chinese, to the same schools with white children, then by treaty with Haiti or Santo Domingo negroes from those islands could be admitted to the same schools with white children in Mississippi, let us say, where native-born negroes, citizens of the United States, cannot attend white schools.

The President in a Massachusetts speech is quoted as saying: "States rights ought to be preserved when they mean the people's rights, but not when they mean the people's wrongs." In God's name who is to say what are people's rights and what are people's wrongs? If I undertook to answer the question I should say *the people themselves*. And then if I were asked further—how they were to say it or have said it, how they were to draw the line or have drawn it, how they were to prescribe the people's rights and proscribe the people's wrongs—I would say through the fundamental organic law,—the Constitution of the United States, and in the constitution of the several states, which are *the prescribing voice of the people themselves*. "Thus far and thus far only shall any governmental authority over man ever go."

We are running mad. The latest proposition is to have a law for federal registration of automobiles, on the ground that automobiles do sometimes travel over state lines! It is proposed by the President to charter, and by Mr. Bryan to license, corporations chartered by the states, to enter into interstate business. The President's latest astounding proposition is to leave a branch of the executive government to distinguish between good trusts and bad trusts, mark out one for a license to do business and another for extirpation while maintaining the substantive part of the present

anti-trust law. What a campaign contribution breeder that would be! How the combinations and trusts—the present substantive law being cunningly retained—would run over one another in contributing to the campaign funds of whichever party was in power in order to bias the executive department of that party in finding them good and not bad!

I have referred once before to administrative usurpations of federal power as the most dangerous because most insidious and least seen by the average citizen. I wish that some of you, who have time to do it, would study the case of *Ju Toy*, a Chinaman, reported in 198 U. S. This man was born in the United States, went to China on a visit and came back; was sentenced to deportation as an alien by the immigration commissioner, whose sentence was affirmed by the Secretary of the Treasury. In some way the poor devil managed to communicate with a lawyer and to avail himself of habeas corpus proceedings. The referee found *Toy's* statement that he was born in America to be true. The case finally got to the Supreme Court. That court decided that the question of fact as to whether he was or was not a native-born citizen of the United States had been decided by an administrative tribunal authorized to try it, and that that finding was final and conclusive. In other words, that it made no difference whether, as a matter of fact, *Toy* was a natural-born citizen or an alien, he was banished, and that was all there was to it!

It is not alone in connection with this case that the courts have held that they could not question the conclusions reached by executive and administrative tribunals, and that no appeal to any court would lie, but in other matters as well. The power reposed in the Post Office Department, although it has not as yet been as seriously abused as it may be, is a power out of which the destruction of the entire principle of the freedom of the press may flow. The department may to-morrow, if it choose, cut off the "*New York Times*," or the "*North American Review*," or "*Collier's Weekly*," from the right to be transmitted through the mails under a fraud order. If it chose there would be no appeal to any court. It could, furthermore, if it chose, refuse by a fraud order to permit any mail to be delivered to either of them, or to me, or to you. It could do this upon the report of detectives in the department, and perhaps the first we would hear of it would be missing our mail.

And may be upon complaint and inquiry by us as to the exact point in which we had offended the department might furthermore return the answer that it was "not practicable to make a reply" to our inquiry. Franklin Pierce, at any rate, quotes a case in the book to which I have referred, where certain printed matter was excluded from the mail on the ground of "obscenity." The department was asked to specify in what respect and how and where there was anything obscene in the printed matter, and it is quoted to have replied that it was "not practicable" to answer the inquiry. It is not to the purpose to reply that the department would not do what I have supposed. That it *might* is a sufficient danger to human liberty.

In the case of South Carolina against the United States,³ the Supreme Court says of our constitution—which, I repeat, is the only sovereign in America, except the people themselves acting in a prescribed way while exercising the power to amend and change it—the Supreme Court says of that constitution that it "speaks not only in the same way, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people." That phrase ought to be memorized by every schoolboy who is studying "civil government" in a public school. Whatever the British constitution may be,—unwritten, not exactly definable—the American constitution is an instrument of written, prescribed, fixed sentences, phrases and words, that do not dance about kaleidoscopically upon the printed page and bear different meanings to-day and to-morrow, but mean just what they meant when they were uttered, although to-day, of course, they may be applied to very many conditions and instrumentalities that did not exist then. "Whenever an end aimed at is constitutional, then all proper means to that end are also constitutional." The great federal judge himself, John Marshall, uttered these words. The converse to that is not true, to wit, that whenever a certain means is constitutional, therefore the end aimed at is constitutional. Congress has a right, for example, to regulate interstate commerce, but if the end aimed at be not in verity the regulation of interstate commerce, but be the regulation of child labor, or manufacturing, or education within a state, and the interstate commerce clause of the constitution be

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resorted to merely as a means to the accomplishment of this latter end,—an end which in itself is unconstitutional,—then the thing sought to be done is exactly the opposite of that which John Marshall said could be constitutionally done.

One of the things most precious in our dual system of government is that the very fact of there being so many state governments in so many different climates, with so many different sorts of populations, so many different systems of agriculture, such diversity of pursuits and occupation, heredity and environment, enables our laws through the instrumentalities of the state legislatures to be adapted to the needs of the communities. Thus the states become great experimental fields. South Carolina can experiment with the dispensary law. If damage ensue it is limited to South Carolina. The people of the balance of the states can watch it without harm and learn lessons, find out if it is to be imitated or avoided. If Oklahoma wants to make an experiment of governmental guarantee of bank deposits, the balance of the union can watch the experiment with interest and with profit, without loss, no matter how it turns out. If Oregon wishes to try the experiment of initiative and referendum the same observation is applicable. All of us can watch the experiment of woman's suffrage in Colorado and some day imitate it or else learn to avoid it. And so with infinite diversity of surroundings and influence, with emulation existing between localities, the federal government does not need to experiment. In other lands experiments, if harmful, are national hurts.

The very maxim, "*E pluribus unum*," is a Federal maxim. We must preserve not only the "one," but we must preserve with equal care and jealousy the integrity of the "many" governments which constitute our system—an "indestructible union of indestructible states"—"a republic of lesser republics."

May God grant that Jefferson prove right and Macaulay prove wrong and that this constitutional, democratic-federal republic of ours prove not a failure, as it assuredly must, if individual self-government—based on the "self-denying ordinance of a majority" denying absolutism to itself even,—and if local self-government, or home rule,—based on the reserved rights of the states,—be lost sight of by us or our children.

DEVELOPMENT OF THE FEDERAL GOVERNMENT¹

BY HONORABLE THEODORE E. BURTON,
Member of Congress from Ohio.

In the brief time at my disposal, I can only touch superficially upon a few of the principal questions involved in the relation of the national to the state governments. Prior to 1789, it was the despair of statesmen to harmonize two sovereignties each having jurisdiction over the same territory and the same people. Leagues, confederations and federal unions had been tried, but all with more or less discouraging results. Our experiment in the United States has, however, succeeded. Yet we must realize that any federal union must necessarily, in its field of activities and in the balance of powers between the whole and a part, or the parts, respond to changing conditions and emergencies. If the relation between them should be marked by rigidity, if there be no possibility of changing the balance of power between the two, the public welfare would not be subserved. Our constitution was framed in the days of the spinning wheel, the stage coach and the sail boat. Times have changed, and there have been world-wide revolutions in the relations between governments and the people. Laws and constitutions must change with the times. Prime ministers, legislators and presidents must change their views to meet the changing conditions, else they fail of their duty.

Modern civilized peoples, under democratic government and endowed with freedom of action, desire to accomplish ends promptly and in the simplest way. There is ever a powerful tendency to brush aside technicalities, even to disregard settled forms, if they become obstructions. But this disposition, though apparently threatening, cannot be a source of danger; because, unless the modifications which are attempted in the interpretation of established constitutions are acquiesced in as promoting the general weal, they will not be tolerated.

Changes, roughly speaking, have been due to two different

¹In this *ex tempore* address, delivered April 11, 1908, Congressman Burton discussed the paper by Honorable John Sharp Williams on Federal Usurpation.—EDITOR.

kinds of causes. One may be called political. These have been apparent the world over, manifesting themselves in a disposition toward larger nationality, and promoted by patriotism or by sentiment. The desirability as well as the glamour of greater power and influence have shown their effect in uniting peoples of the same blood and race, as in the case of Italy and Germany. Strange as it may seem, nations have gained greater power and enlarged their dominions on the map of Europe more by peaceful amalgamations than by means of war.

Mr. Webster was the great exponent of the supreme control of the federal government. Of him it can be said, as of few statesmen, that he uttered the fiat, "Let there be light, and there was light,"—light on the great questions of the time, light to illuminate the future, light to encourage the patriot and the soldier in the great days of civil strife, and to encourage them to battle for a greater America and a united country. Yet Webster's arguments were for the most part legal and constitutional, and his potent influence was reinforced by the fact that he swam with the tide. Perhaps he foresaw the future. At any rate, his work coincided with forces that were independently operative in his own time.

The other class of changes may be called economic and social. The interchange between counties was not so great when the constitution was framed as between the states in 1908. Philadelphia was further from Pittsburg than it now is from San Francisco. People are now constantly moving to and fro throughout the country. New areas of territory have been settled. The people of every state are interested in the development of the resources of every other state. It is of interest to Pennsylvania and New York that new areas be available for settlement by their surplus population. It is a matter of importance to them that the arid lands of the west should be utilized and made sources of production and wealth for the whole country. The country has a solidarity of interest which it could not have with the old-time means of communication. We have been growing, and are growing, and the most decided manifestation of our growth is that we are nearer together and have year by year a greater community of interest.

Another reason why the federal government is greater than it once was is because of its superior efficiency. It is a matter of common knowledge that if two offenders are to be tried and pro-

ecuted for crime, one in the federal and one in the state courts, there is assurance that he who is prosecuted in the federal court, if he is guilty, will have his deserts, and that promptly. If the prosecution is in the state courts there is a great deal of doubt and delay.

Again, the greater area in which the federal government conducts its operations gives a more comprehensive education, affords a more ample field for reaching correct conclusions and accomplishing great results. Take for instance the geological survey. There are men equal in ability to the members of this service in the employ of the states; but how much more skilfully and satisfactorily can the work be done by men who have the whole country as their sphere of action. The growth of the Agricultural Department, too, is due to no disposition to usurp power which should be left to the states, but to the deserved recognition of the greater care and skill with which its work is done. This department has become a great university, making scientific investigation of the needs of agricultural production everywhere,—alike helpful to the grower of cotton and of grain, alike helpful to the North and the South, the East and the West.

Another factor which has worked in the same direction has been the magnitude of the public works or national enterprises, which in this day require an expenditure and a degree of co-operation difficult to obtain except through the nation. The large expenditures called for often stagger municipalities and minor political divisions.

As I understand my friend Mr. Williams, who has just preceded me, he has introduced a bill for the construction of ordinary highways in the states.

Mr. Williams: That is not true.

Mr. Burton: Well I am glad to hear it.

Mr. Williams: It was a bill giving the surplus to the states.

Mr. Burton: Well I trust there will be a large surplus, but I trust that it will not be disposed of in the way you suggest.

These examples show that there are many undertakings imposed upon the federal government which might well be in charge of the states, and naturally would be. Those who favor a limited sphere of action for the federal government certainly cannot expect their theories to be adopted while they are themselves seeking appropria-

tions from the federal treasury for objects which belong to local communities. I watch with some apprehension these tendencies to rely upon the federal government, for I believe that projects are carried to a successful completion approximately as they are undertaken by those who are in immediate touch with them, by those who can scrutinize and inspect them with accurate judgment to determine whether or not they are wise, and who at the same time have the salutary check which rests upon those who must bear the expense.

It is clearly inevitable that the field and activities of the federal government must increase. Such increase is not the result of any change in political theory or of any usurpation of power. It is due to the greater scope of public undertakings. The most progressive nation on the globe must display a growth and an enlargement of its sphere of action or it will fail to serve its purpose. Whether a gradual readjustment of the relations between central and state governments comes by constitutional amendments or by interpretation of existing laws and constitutions,—such a re-adjustment is sure to come. The amendments to the federal constitution have been very few, but the wisdom of the founders and sufficiency of this great charter have been shown by our ability to meet new conditions without revolution, and without menace to the rights of individuals or states.

This tendency to centralization has no doubt been greatly promoted by the failures of states and minor communities to prove equal to the occasions which arise. With a state it is just as with an individual. If the individual shows ability and practical interest he will have influence in political affairs. If a state displays civic pride, and its citizens grapple with the questions of the times and solve them, if its officials prove themselves equal to each new emergency, then that state will have no occasion to complain of the enlarged powers and influence of the federal government. It is especially true that if the states seek to have the federal government do something for them which each state might do for itself, this will notably strengthen the power of the federal government. Under an ideal condition each city and state should not only be actuated by a desire to accomplish the greatest possible good for the whole people, but should be marked as well by efficiency in attaining great results. If states fall below this ideal condition it is not the fault of the central government, but of the citizens of each state.

I cannot believe that we are to suffer from the usurpation of the executive or any other power. How can there be usurpation when this free people every four years can choose a President and review his policies? Is it possible? President Roosevelt showed the disposition to take the steps which have exposed him to the accusation of usurpation; yet later, when his claims were presented to the people in 1904, he was re-elected by a majority so overwhelming that it is unparalleled in the whole history of popular elections. Even my friend Mr. Williams is maintaining a filibuster. Why? Because even he coincides with this same usurping President in favoring certain legislation.

I may refer to a few specific instances of alleged abuse of power which have been mentioned. Was it not proper and necessary that the federal government should undertake the work of irrigation, not merely because it was for the public welfare but because the problem could be solved in no other way? It was found that in any efficient solution to this question plans must have regard to more than one state. Watercourses furnishing the means of irrigation had their sources in one state and flowed into another. It is true that incidentally the land of private individuals was furnished with water from these irrigation canals. But the great object and end was to bring together the waters of one state and the dry lands of another. There is another standpoint from which this policy may be justified, and that is the right of the government to deal with its own property, that is with its public lands. The recent recommendations of the President looking to the conservation of water for power, for irrigation, for the promotion of navigation and its treatment for clarification with a view to preventing injuries to public health, were based upon the idea that all these uses were so inextricably interwoven that the whole subject should and must be treated as one great problem. With the thought that land is an asset of the people, comes the one that water is a source of wealth which must not be neglected, but the management of which cannot be confined to any one state or limited jurisdiction. A combination of all is necessary for the proper utilization of each part.

Let no man be afraid of the republic or of the extension of federal power. This extension will go on normally as befits a growing and a free people. Many of the evils which are complained of could be entirely avoided if greater pains were taken to thoroughly

establish distinctive jurisdictions for different activities and objects of government. I am strongly inclined to believe that the interstate railways of the country must at an early day be incorporated under the federal government, and be under its jurisdiction. They are a part of the nation's life. They are its great arteries of trade. If a road runs through six or eight states and one state seeks to lower rates almost to the point of confiscation that is injurious to all the other states. In a city in the Middle West an ordinance was passed that no express train should pass through the wide limits of the municipality at a greater rate of speed than four miles an hour. What was the result? Express trains between West and East were delayed twenty minutes by this absolutely unnecessary regulation, framed with a view to compelling the railway company to make certain concessions to the municipality. If a score of towns had adopted similar ordinances communication between the separate states of the country would have been very much hampered.

In some enterprises of large scope the almost forgotten clause of the constitution allowing agreements between states by the consent of Congress might be utilized to advantage. In many minor matters, such for illustration as the construction of roads, certainly those which are not interstate, entire control should be left to the states. They have their own responsibilities, their citizens who desire to take an active part in state affairs; and this citizenship will not accomplish that which it is qualified to accomplish, without leaving to the states a proper sphere of action. But let us not be afraid of usurpation. The dominant influence of a strong hand may be exerted in a case of popular indifference, but the government of this country rests with the people, and though they may be negligent for a time, the great fundamental principles will in the end prevail. You, the electors, are the high priests in the temple of good government. If profane hands enter and defile the altars of liberty it is because you who should be their defenders stand idly by.

THE NATION SHOULD SUPERINTEND ALL CARRIERS

BY HON. C. M. HOUGH,
Judge District Court of the United States, New York City.

To clearly state a question, one may assume some matters as axioms without necessarily giving them adherence. When however, in a democratic country, the question put is political, such assumption justifies a suspicion that the speaker believes the sense of the majority, if not a majority of the sensible, to be in favor of the matters taken for granted.

In this spirit I regard as axiomatic these propositions,—that corporations require governmental control; have received too little in the past, and will get a great deal more in the future; that the desire for such control grows largely out of the majority belief that men accustomed to large affairs are somehow untrustworthy, and must be restrained by those less competent in business but more numerous at the polls; that any business affected by a public use must be regarded as a public trust, wherein the trustee is to be governmentally coerced into conduct primarily pleasing to the majority, and it is charitably and sometimes pharisaically hoped, incidentally profitable to himself; and that this governmental control must usually be in the hands either of Congress or a legislature, but in some cases should be divided between them. After making these assumptions, I believe the subject in hand is an inquiry, as to which control center will upon the whole yield the greatest degree of justice, compatible with public convenience.

If the discussion were to take full scope, it might well be asked why *corporate* control only should be considered, for it is obvious that control of corporations as corporate bodies is a comparatively small matter. It is control of *business*, at present largely conducted by chartered companies, that is the question of the hour, in a day when economics have become politics, and political economists are thought producible by referendum or initiative. If business is

to be controlled, it is obvious enough that the substance thereof and not the form of transacting it must be finally regarded by the law,—partnership and private affairs will not be protected from governmental supervision by any absence of incorporation.

Since, therefore, several hundred years of legal history have marked the business of a public or common carrier as one peculiarly within the regulatory or police power of the sovereign, I have ventured, on your president's kind invitation, to speak regarding, not the legality, nor immediate possibility, but ultimate necessity of national control of carriers if the demand for supervision remains insistent. The argument of convenience will usually win in the long run, unless it encounters a moral principle, and that argument favors a centralized control, removed alike from local prejudice and local pride. Is there any moral principle, requiring a business covering navigation, railroads, expressage, telephony and telegraphy, to remain for the most part under the control of forty-six sets of regulations and regulators, when the business itself is national and international, and competition has perceptibly become an economic international conflict?

The impossibility of a fair uniformity, or uniform fairness on the part of so many laws, legislatures and commissions, to the men and affairs regulated, will in time weary all but those who hope for place under one of the conflicting systems, or doctrinaires to whom a theory is dearer than the removal of conditions, however odious. For modern evidence of how divergent and irreconcilable in scope and purpose, and how impotent for ultimate good, our present multifarious systems are and must be, one need but read the published reports of proceedings of the National Association of Railway Commissioners, bulky volumes, not to be considered without sorrow and some cynical amusement.

Secretary Root has recently appealed to the several states to bestir themselves for more efficient governmental regulations, and to subordinate local interests to general welfare. His voice is of one crying in the wilderness, for it is as true now as when Mr. Pinckney said it in 1787, that "States pursue their interests with less scruples than individuals." The Supreme Court has already repeatedly considered endeavors of state authorities to compel the transaction of railway business in a particular state or part of a state at a loss, upon the plea that the interstate business of the

compelled corporation was sufficiently profitable to warrant the local gift. Such a gift is indeed a benevolence in the legal and disreputable meaning of the word. Nor has it been unknown that men in local authority have threatened carriers with drastic hostility in local matters, were not interstate rates made more agreeable to constituents. This is retaliation, not administration, and until the unity of commerce is recognized by putting its agencies under one control, such manifestations of local self-seeking will continue, and probably increase.

It is now notoriously true that the carrying enterprises of the nation, from railways to telephones, are largely owned (if not abroad) in parts of the Union remote from the carrier's region of operation. Can it be denied that the last few years have shown a determined recognition and punishment of absentee landlordism on the part of local authorities engaged in regulating carrying corporations? Such denial is impossible, and it is equally impossible to anticipate a termination of that condition as long as local capital remains as limited as it is in most of the United States, while local rates for money remain higher than the highest return reasonably to be expected from the carrying trade conducted through corporate organization. In most of the states local money does not go into the carrying trade, because it can be more gainfully employed otherwise, but that fact never induces local authorities to recognize the local money rate as the carrier's return rate. It is surely a legitimate position for the public to take, that the owners of the carrying corporations shall have a voice, however still and small, in the selection of their regulators, by making the selection a national and not a local affair.

Again, if conditions perfectly well understood in our older and richer states be considered, the observer must recognize as a figure familiar in the business and political background the corporation of numerous local shareholders of large local influence, and for the time being obnoxious to no considerable class in the community. Has a foreign rival, a new competitor, a fair chance before the local regulatory bodies in opposition to such a carrying corporation? No man of experience in interstate business can answer that question affirmatively, and by just so much as local regulation becomes more organized and better established and more drastic if not more efficient, by just that much will local

pride and local prejudice give to local enterprises a preference undue under the law and undesirable for the people at large. Nor is it either a vain imagining or a jeremiad that a really active, vigorous and selfishly able administration of the carrying business by the coast states may become, and in no long time, a serious grievance to interior producers.

But it is not an unusual change of public attitude for a corporation to become, through the misdoings of one man or the mistakes of a few, an object of local execration. Its pursuit and punishment become political virtues, in which all parties strive to excel. This condition is so frequent to-day, that to name any special corporation would be an invidious distinction. Will not national control allay, if not prevent, local inflammation and render more difficult destruction of what should be cured, but need not be killed in the process?

The relation of foreign to domestic commerce is a subject not to be exhausted by many hours of discussion, and it is of growing importance. The two are interdependent. If domestic operations are disturbed or ill-managed, foreign commerce will suffer. While no matter how well arranged the local management of a state's commercial affairs may be, no one state is strong enough to withstand, and indeed it will not ordinarily discover until too late, foreign domination of its domestic commerce. I do not admit this to be wholly a glance into the future, but the facts of to-day are not publicly understood, and probably nothing will convince any considerable portion of the people of the United States that a real danger here exists, until they discover themselves pecuniarily injured, and by overwhelming evidence.

There is another matter very presently before the public, and as to which the utter inefficiency of state control has been demonstrated beyond peradventure. Next to land investments, the railroads of this country most largely represent the savings of the labor of an industrious people for some hundreds of years. Mr. Mather, of the Rock Island Company, said last fall: "There is a prevailing public belief, based on facts publicly known, that railroad corporations have issued corporate obligations and applied the proceeds to purposes other than those for which such obligations may lawfully be issued." This he regards as the great railway wrong doing—well known and long continued, and princi-

pally productive of that condition of the public mind, which renders our present discussion opportune. He need not have confined his indictment to railroads. The carrying corporations as a class are not more guilty than others, but they have greater opportunities of guilt. With inconsiderable exceptions every carrying corporation in the country is incorporated by a state. Have the states generally attempted to limit the capacity of their corporate creatures for working harm in this way? Certainly not. And can they do it? Considering how states bid against each other for corporate business, it is doubtful. Would they do it if they could? What inducement is there for either the legislative or the executive department of a small or poor state to control the financial operations of a corporation whose financial business is wholly conducted in other states? There is no self-interest requiring the regulations, and I doubt the power of altruism to bring it about.

No one believes, and I am as far as possible from asserting, that national control would be perfect or always wise, but it is necessary. If it be worth while to avoid unnecessary multiplication of conflicting laws; to set a bound upon local selfishness; to protect those citizens whose property is represented in carrying corporations of states not their own; to limit the power of some favored corporations; to protect perhaps the same corporations when political rancor turns against them; to recognize and foster the close relation between foreign and domestic commerce, while presenting a firm front to un-American domination, and to limit by national power the financial operations of common carriers of all sorts then national control must come. If these things be worth attempting or possessing, then so far as the legal framework of our country will permit, the effort of all thoughtful citizens should be to secure control of all the instrumentalities of commerce for the nation as opposed to any and every smaller governmental unit. Whether the result which seems to me desirable be also constitutional is a question not to be elucidated in twenty minutes or twenty days—nor is this the place for such technical discussion.

I have not attempted a brief nor set a program, but have ventured to indicate a desirable goal towards which may press those who have no local axes to grind nor scalps to take and who believe that what is national in extent should not be parochially administered. It may, however, be safely asserted that the field of national

control over the instruments of commerce has scarcely been surveyed, and the legal possibilities within that field are surely large enough in a country where the chairman of one of the committees which reported the Sherman Anti-Trust Law declined to hazard an opinion as to what contracts were covered by the statute he favored, and put his refusal upon the ground that he did not know, and it was the business of the courts to find out.

Is this result, even if desirable and in large part legally attainable, practically possible? No man can tell until the attempt is made. National effort of every kind has in this country usually been regarded as a last resort, something only to be attempted when local failure was so evident that even jealousy could no longer deny the truth.*

The present is a time as ripe as ever will be for endeavors to direct national power, not into new fields, but into portions of the old domain hitherto unsubdued. Perhaps, indeed, the present is a peculiarly appropriate time, for just now the cry of monopoly is so popular and the belief therein so widespread, that we have even been seriously told by a noted senator that no more than a hundred men control the business fate of this nation, and in proof thereof he has spread upon the long-suffering pages of the Congressional Record the names and corporate relations of that century of oppressors. Yet with such gravity does a people, which talks far too much of its own sense of humor, regard these statements, that no one has objected that of these tyrants a considerable proportion some time since departed this life; and that one despot is hateful in part because he is a trustee of the Young Men's Christian Association—of Chicago, to be sure.

If, therefore, one does not believe in the present existence of grinding monopoly, yet recognizes the existing demand for regulation, I have already tried to point out reasons for urging national control; but every honest believer in monopoly will in time perceive that centralization cannot be successfully fought by parishes, nor monopoly by confusion, any more than was union by disunion. The ultimate argument will be, and indeed now is, that wherever national union is possible national regulation is necessary, and national co-operation, if not union, is already among carriers of all kinds more than a dream, and its actuality is regarded as beneficent by an overwhelming majority of business men whose opinions are com-

mercially worth having; and these are the men who will more and more nationally unite to do that sort of business which requires national regulation. Will your personal influence be for efficiency in large matters and wholesome neglect in small? If so, I believe you will ultimately advocate national control.

RAILWAY REGULATION IN TEXAS

BY HON. JAMES L. SLAYDEN,
Member of Congress from Texas.

The adjustment of the relative rights of the individual citizen and of his own powerful creature, the corporation, is the latest and one of the most perplexing problems with which we have to deal. The treatment of the question is complicated by the necessity of keeping in mind the constitutional limitations of the federal government and the jealously guarded reserved powers of the states. Furthermore, there is no denying the fact that we approach the consideration of this latter phase of the question more or less influenced by the political school in which we have been trained, and for this reason there is much fog.

I believe, I cannot help believing, that in the governmental supervision of industry and corporations it is better to leave all the control possible with the states. The states are nearer the problem and the people. The scope of that power and the limits of its exercise are gradually being defined by the courts, both state and federal, and it gratifies me as an American citizen to be able to say that when the boundaries are once clearly defined by the higher courts there is prompt, cheerful and general acceptance of the decision.

But, Mr. Chairman, it does not become me, a layman, to hazard my small reputation in the discussion of such purely legal questions, and, acting on a hint given by one of your distinguished members, I shall confine myself to a brief review of the more important corporation legislation of my own state and some of the consequences that have come from it.

Texas Not Opposed to Corporations

The very name of Texas is an anathema in corporation circles, and most unjustly so. Few of the harsh critics of the mighty commonwealth that contributes not less than 175 million a year to the vast total of our exports have thought to inquire what Texas has done for the corporations. I now refer particularly to

the transportation lines that are at the same time the most useful, the most powerful and the most abused of all corporations. These critics invariably say that the corporations have made Texas and that Texans are not grateful. I do not think they are accurate in that statement. The corporations have certainly accommodated the state and have expedited its development, and we duly appreciate the service.

But, it is pertinent to inquire, what has Texas done for the railways, and on which side is the debt of gratitude? States now and then do great and generous things. It is possible to them because they are not organized for profit. But, except a few uncaptialized associations for charity, who knows of a corporation that exists or operates for any other purpose than gain?

The government of the State of Texas appreciated the importance of lines of communication, and in order to induce the construction of railways the legislature, in 1854, nine years after we came into the Union, passed an act giving to each corporation sixteen sections, or 10,240 acres of land for each mile of road constructed. In addition the state gave the right of way over the public domain to such roads as crossed it. Under this act there was surveyed out of the public domain and transferred in fee to the railways the stupendous amount of 34,179,055 acres, nearly equal in area to the great State of Kentucky, and more than three-fourths of the area of Pennsylvania. Please remember that these donations were not made at the time that William Penn became proprietary of the colony of Pennsylvania, when North America was a wilderness, lands worthless and continents were disposed of at the whim of a sovereign, but in the last fifty years, after Europe had already become so suffocated with people that thoughtful statesmen were seeking new lands to relieve the congestion. That great body of land had a distinct and an immediate value. It took no unusual business sagacity to see that it represented enormous wealth.

Texas had an area of 265,000 square miles, and a comparatively small population so scattered that the people were beyond many of the comforts of civilization. The statesmen of that day were controlled by a perfectly fair spirit. They knew that no railways could earn dividends at once in the ordinary operation of the lines, and these excessive subsidies were given with the perfectly clear

understanding on both sides that they were intended to cover the business risk of constructing in advance of actual necessity. They were meant to cover, and I do not doubt that they did fully cover, the period of waiting until the state had been settled and traffic developed.

That by some sort of juggling only comprehended in the higher financial circles this valuable asset was taken away from the share purchasers and transferred to the private accounts of a few people of an inner circle is, I suppose, also true. But Texas was not responsible for that, and so long as the forms of law were observed could not interfere nor, so far as I am advised, was interference ever invited. Great fortunes were made by the few who got the land and other valuable assets, and the buyers of the shares in the railways that were speculatively built ahead of the service demands, or the possibility of immediate profitable earnings, were left with certificates of ownership in property that was tremendously over-capitalized. When these innocent purchasers complained that they could get no return on their investment they were invited to turn their wrath loose on the state that had given so prodigally. Since then we have been the target for every ill-advised and unfortunate speculator in these shares.

I feel that in this connection I may ask you to consider the fact that the lands given by Texas to induce railway construction are, at their present assessed value, worth more than is every mile of road, including equipment, in the state at the present assessed value of the physical property of such corporations. This estimate of comparative values takes into consideration the thousands of miles of road that have been built since the state discontinued land donations.

Resources Available for Traffic

By the aid of railways and because a fertile soil and agreeable climate made it inevitable, the State of Texas has grown rapidly in population and marvelously in production. When it was joined to the Union by joint resolution in 1845, Texas had a population of about 150,000; to-day, speaking conservatively, it has about four and a quarter millions.

Out of each five bales of cotton produced in the whole world Texas supplies one. We market more cattle each year than any

state in the American Union. We have wheat and maize for export. We have a pine forest in East Texas—at least the lumber trusts have—about eighty miles wide and nearly three hundred miles long. Our granite quarries were lately described by Dr. Willard Hays, of the United States Geological Survey, as being “really inexhaustible.” The railways each year send out train loads of vegetables, melons, berries and fruits. To the production of rice we devote a larger area than that of some states. Our sugar and tobacco plantations have great and increasing importance. All these and more traffic-making industries are reached by the railways that were built by Texas and are now owned in New York.

Constitutional and Statutory Control

From time to time in the past we have enacted laws to regulate the operation of these lines of transportation and to fairly adjust charges for service, and it is absolutely certain that we will do so in the future. Every act may not have been wise, but certainly none were intended to be confiscatory. No citizen has wanted to cripple the railways, or to prevent a reasonable earning on the actual investment. The purpose of the laws is to insure justice and fair treatment.

Section 26 of Article 1 of the State Constitution declares that “perpetuities and monopolies shall never be allowed.”

Section 5 of Article 10 says that, “No railroad or other corporation, or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line.”

Section 6 of Article 10 says: “No railroad company organized under the laws of this state shall consolidate by private or judicial sale or otherwise with any railroad company organization under the laws of any other state or of the United States.”

Several acts of our legislature have sought to make these constitutional limitations operative. Gentlemen whose services are con-

trolled by a large fee and whose consciences appear sometimes to be able to hide behind a small technicality will tell you that the corporations they represent have obeyed the spirit and the letter of these laws. But, Mr. Chairman, it is known of all men who have tried to keep themselves informed that the constitution, so far as it could be done, and the statutes thereunder made, have both been defied. It might reasonably be expected that this defiance of the solemn enactments of the people themselves would awaken a spirit of anger and reprisal. Yet I do not think it has done so to any appreciable degree.

A recent incident in the transportation history of the state will prove, I think, that it has not done so. The railway commission of Texas ordered that the passenger fare on the Houston and Texas Central Railway be reduced to two and one-half cents a mile. The enforcement of the order was enjoined in the federal court, and, while the case was pending, the people of the state, the people whom the order was intended to benefit, acting through organized bodies, and individually, declared that the time had not yet come in Texas when the railways could afford to carry passengers for two and one-half cents a mile, and the order was abandoned. These same people in large numbers petitioned the legislature, when that body thought to take the matter out of the hands of the railway commission, not to reduce the rate charged for the carriage of passengers.

The Railway Commission

In 1890, by vote of the people, the constitution of the state was amended and the legislature empowered to create the state railway commission. It has sometimes been described by its enemies as "a commission with teeth." It has the power to fix the rates for the carriage of goods and passengers. It has exercised that power in the main with justice and fairness. From time to time, as business developed and earnings seemed to justify it, railway rates have been reduced. Of course that reduced the earnings, but, on the other hand, it broke up the habit of giving rebates and that, in turn, increased earnings.

It has done another thing that entirely justifies its existence. It completely abolished the pernicious practice of discriminating between sections and therein has promoted a symmetrical develop-

ment of the state. Before the commission undertook the regulation of rates a few cities controlled the wholesale trade of the state. Now there are many small centers of trade from whence a profitable wholesale business is done. It has materially helped to a distribution of population, a thing that is very desirable in itself.

Under the terms of law the commission also has a sort of supervision of the physical property of these corporations, that is, it has the power and it is made the duty of the commissioners to see that traffic is not impeded nor the lives of passengers put in jeopardy by a failure to keep track and rolling stock up to a reasonable standard of efficiency. One would naturally think that this duty was of the highest privilege and that the roads themselves would hurry to execute an order, if reasonable, intended to protect the lives of their patrons. Strange to say such orders seem to be resisted with more vigor even than one to reduce the freight charges.

In a sensational manner one of the great roads has lately been put into the hands of a receiver, appointed by a federal court, and avowedly for the purpose of avoiding an order of the Texas railway commission. At the risk of exceeding the time allowed me for this speech I shall give you a brief history of this case.

Mr. O. B. Colquitt, of the Texas railroad commission, under date of April 4th, has furnished me with the following account of the circumstances that lead up to the placing of the International and Great Northern Railway in the hands of a receiver. For the sake of brevity I will merely use extracts from Mr. Colquitt's letter, hoping at some other time to publish it in full:

A few months ago the commission determined to make an inspection of the physical condition of the properties of several of the railways in the state. We had been receiving such numerous and general complaints in the danger to life and property transported over these lines that this induced us to take up this matter. Frequent and numerous wrecks of passenger and freight trains were reported to us, which resulted in the destruction of property to a greater or less extent, which had to be paid for by, and was a clear loss to, the railroad company. Perhaps the injuries, loss and damages resulting from wrecks in the last six months on the I. & G. N. R. R. have amounted to a very large sum of money.

The commission, after an inspection of the physical property, issued its order direct to the I. & G. N. R. R. Co., calling upon that corporation to improve its roadbed and put it in a more safe condition, and requiring of it

a reduction of their time card equal to the average loss of time shown by their train sheets for thirty days prior to the issuance of said order. The schedule of the trains was accordingly reduced in compliance with said order, and the railroad company, through its officers, notified us that they would comply with the terms of the commission's order as far as they were able to do so, the attorney for the road stating to the commission in person that it was believed that the commission's order in that respect requiring improvements was reasonable and just, and ought to be complied with. We had the assurances of the managing officers of the road that they would attempt to make a compliance with said order, and had begun to report to us that, in pursuance of same, improvements were being made.

The commission is not able to say why the proceedings in the federal court were taken, unless it was for the purpose of avoiding a compliance with its order requiring an improvement of its property, which the officers of the road admitted to be just and reasonable, in the interest of the property and to secure the safety of the traveling public.

The total average amount of bonds outstanding on the I. & G. N. R. R. Company's mileage at this time is \$22,465, and the stock is \$8,820, making a total of \$31,809 of stocks and bonds per mile.

The physical condition of the road certainly justified the railroad commission in issuing the order it did requiring its improvements.

The following statement, showing the number of wrecks that occurred on the International and Great Northern Railway for the period of time shown in the statement, appeared in the *Houston Post*, of February 29th:

Ninety-nine wrecks since June 30 is the record of the I. & G. N. R. R., which because the railroad commission of Texas ordered it to improve its trackage and lessen the danger to the lives of its patrons, was placed in the hands of a friendly receiver. There is not another railroad in all Texas which in eight months will average a fraction over twelve wrecks per month on a mileage of 1,163 miles. Mr. Gould, who holds the controlling interest in this railroad, charged that the Texas commission was responsible for placing the road in the hands of an attorney of another of his lines.

Upon request, Secretary McLean, of the railroad commission, to-day addressed the following communication to Commissioner O. B. Colquitt:

"In pursuance of your instructions, I enclose herewith copy of an order issued by the railroad commission of date September 17, 1907, and amended October 14, 1907, requiring railroad companies to report to the railroad commission of Texas all wrecks and causes thereof on the railroads in the state.

"Engineer Thompson, of the commission, reported on December 17, 1907, on the main line of the I. & G. N. R. R., between Longview and Laredo,

from June 30, 1907, to November 25, 1907, 27 wrecks. The commission has received reports since that date of 9 wrecks up to and including February 27, 1908, or a total of 36 wrecks since June 30, 1907.

"Engineer Thompson, in his report of February 1, 1908, on the Gulf Division of the I. & G. N. R. R., between Palestine and Houston, from June 30, 1907, to January 18, 1908, shows 15 wrecks, since which date 5 wrecks have occurred on this division and two between Houston and Galveston, making a total of 22 since June 30, 1907, between Palestine and Galveston.

"Engineer Thompson also lists in his report of February 4, 1908, 33 wrecks on the Fort Worth Division of the I. & G. N. R. R., Spring to Fort Worth, from June 30, 1907, to January 12, 1908, since this period 8 wrecks have been reported to the commission on this division, making a total of 41 accidents since June 30, 1907, or a grand total on the whole road of 99 wrecks from June 30, 1907, to date.

"The above information is from records filed in this office by the officers of the railroad company."

I regret to say that the story of the bad condition of the track, the rails, ties and ballast has not been exaggerated. It has been seen and admitted by officials of the road as well as by other citizens of the state. Travelers from the North and East who are accustomed to greater comfort and security than we enjoy have fairly shouted their condemnation of the policy of a great corporation that has shown so little regard for the safety of its patrons. Commissioner Colquitt tells me in his letter that high officials of the road have admitted to him that the order of the commission was proper in every way, that the improvements were urgently needed and the demands moderate.

I quote here another paragraph from the letter of Commissioner Colquitt:

As you perhaps already know, the I. & G. N. R. R. Company, under charters granted by the Texas Legislature in the early '70's, was authorized to construct a line from Longview to Laredo, and to consolidate with the Great Northern Railroad, which had a line from Houston to Palestine. By the terms of the legislative act permitting said consolidation and chartering said road, the State of Texas agreed to give to said railway company as bonuses state bonds to encourage the building of said road, amounting to \$10,000 per mile. Subsequently, by compromise, the I. & G. N. R. R. Company accepted twenty sections, or 12,800 acres of land per mile of road in lieu of the \$10,000 per mile of state bonds which the legislature originally pledged to said company.

Mr. Colquitt might have added that this road not only had a land subsidy of 12,800 acres per mile, but in addition, as a part of the compromise he refers to, enjoyed exemption from tax-paying for twenty-five years. The history of that transaction makes one of the most interesting chapters in the account of the prodigality of Texas, and has embalmed the memory of carpetbag government without entirely removing the odor.

In connection with the receivership transaction, Mr. Chairman, I will merely add that I am informed that the operating officials of the road—the personnel of which has lately changed—have persistently asked authority to spend a part of the earnings of the corporation in the improvement of the property.

State Direction of Corporations

What is known in Texas as "the stock and bond law," passed in 1893, is an enactment of the twenty-third legislature, of which body I had the honor to be a member. At the time it did not have my complete approval, because I lived in the western part of the state, where we did not have enough railways, and I thought that it would interfere with their speculative building. But I do now endorse the law, absolutely and unreservedly. Here is an extract from that celebrated act:

Hereafter no bonds or other indebtedness shall be increased or issued or executed by any authority whatsoever, and secured by lien or mortgage on any railroad or part of railroad, or the franchises or property appurtenant or belonging thereto, over or above the reasonable value of said railroad property, provided, that in case of emergency, on conclusive proof shown by the company to the railroad commission that public interests or the preservation of the property demand it, the said commission may permit said bonds, together with the stock in the aggregate, to be executed to an amount not more than fifty per cent over the value of said property.

Surely no investor can object to that law. It merely seeks to guarantee to the buyer of shares in Texas corporations that they are not giving up good money for water. Certificates of stock owned in Texas companies organized since 1893, stand for money or some other thing of value put into the corporation. For some years there was much friction between the railways and the commission, but now there is rarely any trouble between them. Each has come to realize the importance and the usefulness of the

other, and thanks to the great man who was the first chairman of the Texas railway commission, a satisfactory *modus vivendi* has been reached that I hope will long continue.

Mr. Chairman, it is impossible in the time allowed me to give a complete survey of the corporation laws of Texas, even if I were fitted for the task. I shall not undertake to do so. I will only add that we have statutes that forbid "pools, trusts, monopolies and conspiracies in restraint of trade." It gratifies me to be able to tell you that, armed with such laws, we have grappled with a powerful corporation (that is reputed elsewhere to have bought courts and controlled legislatures) and that we have expelled it from the state. Vigorous, honest, resourceful Texas will not tolerate such corporations nor their methods.

We appreciate the difficulty of the work that we have undertaken, but will not let up until they have all been scourged from the state. Texas still belongs to the people, and we have dedicated ourselves to the task of keeping it as an unmatched inheritance for their children.

We are not hostile to corporations. We welcome them under the right circumstances, and when their energies are exercised according to law. We are not only willing to have them earn a reasonable profit on their capital and labor expended, but we rejoice at their success, for we know that they cannot prosper so unless the people share their good fortune. Beyond that they ought not to try to go. Beyond that we will not permit them to go.

Because it has no part in the discussion of the scope and limits of governmental control over industry and corporate management, I shall forbear to tell you of the glories of my state. Besides, you would call me a dreamer and a boaster if I told you the simplest facts about Texas.

CORPORATION REGULATION BY STATE AND NATION

BY HON. HENRY M. HOYT,
Solicitor-General of the United States, Washington, D. C.

The topic is "The State and the Nation as Units of Control," with especial reference to the regulation of corporations. Just as in the field of natural law smaller units combine to form an organism which is not a mere aggregate of the inferior units but a new entity, and through an ascending series, organisms of differentiated function unite in a complete individual existence, so in municipal and conventional law, that is, the law of constitutions and statutes, there is no inconsistency between the nation as a unit of control and a state as a unit of control—between the ultimate unit and the separate unitary members. The state correlates and regulates the activities of persons, natural and artificial, and the functions of the municipal sub-divisions within her borders. The manifest tendency of the present time is for the general government so to correlate the states and to exercise its powers just as far as may be done under the constitution to that end.

There have been antagonisms in the past between the lesser sovereign units besides the great antagonism of the Civil War, which merged all former antagonisms and welded the state units and the national unit into an indestructible and perfect union. It seems strange now to recall, for instance, the sanguinary conflicts in this state between Pennamite and Yankee, which almost amounted to war between Connecticut and Pennsylvania, and yet did not involve the nascent federal power. No one would dream that in any like case now the national sovereignty would not instantly interpose between the contending forces. What a space has been traversed since the days when, very doubtfully, the Supreme Court determined boundary disputes between states, refusing to pass to other controversies between them! For now the court determines without doubt and with plenary jurisdiction that, for example, the United States, by its legislative and executive branches, cannot interpose in a conflict between two states over the irrigation use of the water of an interstate stream, but that the

federal supreme judicial power can interpose, and then proceeds to compose that conflict; determines that the City of Chicago must not pollute interstate waters to the injury of states and cities below, and that the air of the State of Georgia must not be poisoned by fumes from smelters in Tennessee.

The fear of Fisher Ames that the country would prove to be too divergent for homogeneity and unity, and too vast for patriotism, has turned out in the fullness of time to be a groundless fear. Along with that spectre has disappeared the spectre of states' rights. In these days that question has lost its abnormal character and undue emphasis, and we view it in the main with a just sense of proportion and without the old fear and suspicion that the sovereign power and bond between the states will swallow them all up. Yet all the guarantees on this subject must be preserved, and no one can be so foolish as to think that the states and their functions can be regarded as mere municipal sub-divisions of the United States and its powers, for to preserve the separate sovereignties and their relations to the safety, health and happiness of the people, and to obey all of the commands and prohibitions of the constitution on this subject is the very essence of our government.

It must always be remembered that under the constitution there are some activities for which the nation alone is competent, and others for which the states alone are competent. This separation must be preserved, however effectively and uniformly compared with the states, the federal power not limited by state lines may work, and however desirable it may be to advance faster than we are doing in economic and social development, and however the separate states may lag in correlating and unifying state action in matters important for common and equal progress everywhere. I state the general dividing line by quoting two famous passages, one from John Marshall's great judgment in *Gibbons v. Ogden*, the other from the speech of James Wilson, afterwards Justice Wilson, before the Pennsylvania Constitutional Convention of 1787.

John Marshall says:

The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government.

Wilson's statement is:

Whatever object of government is confined in its operation and effects within the bounds of a particular state should be considered as belonging to the government of that state; whatever object of government *extends in its operation or effects beyond the bounds of a particular state* should be considered as belonging to the Government of the United States.

I shall not go into the distinctions and decisions along that delicate line where the federal power over commerce and the state power over matters of internal police meet and sometimes conflict. I proceed to the reasons for my personal conviction that, at least as to corporations, and their relations and activities, the federal regulation should go as far as under the constitution and law it may.

The inquiry is of course restricted to interstate and foreign commerce, and that is one limitation on us, the problem being to indicate why as matter of general policy in doubtful and close cases the leaning should be to national rather than state control. We must also lay out of view interesting current legislation and proposals for legislation on employers' liability and for compensation in any event for accidents (which change the substantive law in important respects regarding negligence, assumption of risk and related questions), because, on the one hand, the federal legislation just enacted is confined to one class of common carriers engaged in interstate commerce, that is to say, the railroads, and because, on the other hand, the proposed compensation laws apply to individuals or firms as well as corporate employers. We must contemplate now the broad general lines and have no time for details.

These are the propositions, then, that in modern and present industrial organization the volume and movement of business are vast and complex, the transactions more and more are carried on by corporations and by combinations which are a necessary and valuable part of effective economic development when duly controlled; that business not only means production and manufacture, but sale, exchange and distribution, that the distributing function is the object of all production, and that the interstate proportion of distribution far outweighs the intra-state share. In former days, for example, Maine lumber and Massachusetts shoes were mostly used at home, but now without any doubt a very much larger proportion of many commodities produced is consumed outside the

state of production than within it. All such interstate movements are part of those matters which are not completely within a particular state, and which do "affect other states,"—referring to the language of Marshall,—and which are objects of government extending in their operation and effects beyond the bounds of a particular state and which therefore should be considered as belonging to the government of the United States,—referring to Wilson's statement.

It is of the greatest concern to all the people of all the states that commercial rules and regulations shall be equal and uniform everywhere. One of the strongest arguments for the union under the constitution was the intolerable burden of conflicting and unequal laws affecting the interchange of commodities, and although the constitutional right of exact and equal justice to all citizens of the United States in any state has been well defined and established, the process of assimilation and harmony among the states is not yet complete. All the people of all the states and their national government must see to it that whatever a sovereign state's policy and power may be as to matters wholly within her borders, the effect of that policy, whether of action or inaction, must not be permitted to pass beyond her borders and injuriously affect other states and their citizens.

"Commerce" is a term of very broad meaning. The Supreme Court has been careful not to limit it by any general exclusions, and no one can now say to what interstate relations and activities it may not legitimately extend in the evolution of judicial doctrine dealing with the evolution of economic and industrial forces. I know that production has been strictly distinguished from commerce in a leading case which, indeed, seemed to present strong reasons for connecting them, because there there was a monopoly completing its ownership of all the plants in the market in order to control and monopolize a production which was necessarily intended only for commerce and in the main for interstate commerce. But a shifting of the emphasis can even now be observed, because the effect of a very recent decision (in the Danbury Hatters' Case) is to show that the production of articles within a state under contracts to be shipped to other states is to be regarded as so necessarily destined for interstate commerce as to come within the federal jurisdiction. The distinction between that case and the Knight case to which I

have just referred is a faint and delicate one, and yet it is plain that the latter decision tends to draw production within a state, designed *ab initio* for commerce among the states, into the category of interstate commerce.

Notwithstanding many abuses of the state power to incorporate, I can see no pressing and conclusive reason why the state should not continue to charter these artificial persons, which, as a general rule, must have a *locus* within some state. They are chartered to do all kinds of business including interstate business, and in any case cannot escape the federal power in the latter field. But the way should open to them, when their only business is interstate, to obtain federal incorporation, if they so elect, subject to state jurisdiction over the principal *locus*, if that is within a state rather than in a territory under the exclusive jurisdiction of the United States, and over any property located within a state. If the business is partly interstate only, then the way should be open to securing a federal license to authorize and regulate and protect that portion of the business. The conclusions to be emphasized are that by whomsoever the interstate business is done, whether by a natural or artificial person, and in whatever way the authority to transact that business is conferred, whether with or without federal incorporation or license, the regulation of such business is a federal matter solely, and the question of the power to regulate is to be determined ultimately by the federal courts. That is the first conclusion, and the second conclusion, it seems to me, is that the true policy of the general government—meaning the policy proper for its three branches, executive, legislative and judicial—is to extend and maintain the federal control over corporate activities in interstate commerce as far as the broadest contents and construction of that term will permit, consistently with the constitution and with reason.

NO COMBINATION WITHOUT REGULATION

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To the succinct statement of the law by Judge Hough, it is unnecessary to add, and it is impossible to controvert. His two broad propositions sum past law and future action—constitutional power exists to discharge effectively any duty entrusted to the Federal Government, and the duty of regulating commerce with foreign nations and between the states will in the end bring the government to the supervision of all the instruments of that commerce, including corporations engaged in this commerce, because without this the first duty would not be fully and effectively discharged. A railroad corporation is regulated by the Federal Government, primarily not because it is engaged in interstate commerce, but because the regulation of interstate commerce is the national duty of Congress. It is not the relation of the railroad to this commerce which brings into action the Federal Government; but the relation of the Federal Government to interstate commerce which brings the railroad under federal regulation. Any other corporation which enters interstate commerce to an extent which renders its regulation necessary to the regulation of interstate commerce will for the same reason come under the scope and sweep of federal power.

In the early stages of the judicial application of this principle, it was inevitable that attention should be concentrated on the extent to which a corporation, railroad or other, entered into interstate commerce; but as federal regulation of interstate commerce grows and extends, becomes more minute and pervasive, the question shifts to the constitutional necessity of the regulation of a particular corporation or a particular scrutiny of the area under consideration in order to make complete the regulation of interstate commerce by Congress. The courts in delimiting the boundaries of federal power always begin by asking whether it is necessary to regulate this person, office, act, corporation or function; but they always end by asking is it necessary to a complete regulation to

include this person, office, act, corporation or function. Their earlier decisions by a natural evolution exclude. Their later decisions include. Their attention is early drawn to the new object on which federal power in its first exercises impinges. Their later attention is concentrated on the central subject of the exercise of federal power, and while the area of this power cannot and is not changed by the courts as they define its boundaries, much which early seemed to lie under state sovereignty and was under state supervision, passes later under an active federal jurisdiction, whose authority always existed but whose boundaries can only appear as it is exercised. This normal process and growth in the exercise—not at all in the immutable substance of federal power—has taken place in many fields. Witness the manner in which the exercise of that share of the police power needed for the protection of the mails and the protection of the community through which the mails pass has grown in its statutory expression and judicial interpretation. Offenses were early left to the punishment of state law. States claimed and sometimes exercised the right to protect the social and municipal rights of the community by a local censorship of the mails. The Federal Government, by statute and decision, more sharply defined the boundaries of its power. They extended over much early and loosely left to the state. At length, in the lottery cases, the Federal Government suppresses by a criminal statute the manufacture of lottery tickets within a state because these tickets could be used only by entering interstate commerce, and the federal discharge of the duty of carrying the mails could only be fully and freely exercised by protecting the mails from injuring the moral standards and well-being of the community. It was a good lawyer and sound thinker, the late J. Randolph Tucker, who as attorney-general of Virginia, held that the state could exclude seditious and inflammatory publications from the federal mails, and the half century from his opinion, which no one can read without appreciating its force, to Associate Justice Brewer's decision in the lottery ticket cases, marks, not a change in federal power, constitutionally unaltered in the interval, but in the development in exercise and interpretation of the power conferred on Congress to establish a post office and post roads.

A precisely similar change, in which fragmentary statutes and decisions intent on the reasons for excluding objects apparently com-

ing within the range of federal statutes, episodic and non-systematic, are succeeded by systematic legislation and embracing inclusive decisions, has taken place in pilotage, immigration and quarantine. It is impending in the relation forests bear to navigable streams. Forest, source, stream, bed and water are each and all indubitably under the sovereignty of the state. Prove that the navigation of the stream cannot be fully and freely regulated without their control and all these things, ancillary to the stream, will pass under federal ownership, jurisdiction and regulation, as a tract of the soil of the sovereign State of Pennsylvania, one of the original thirteen, never under federal control or ownership, could be condemned for national uses, when it had been consecrated to national needs by becoming the site of the Battle of Gettysburg.

This broad and continuous evolution in federal statute and decision which has gone on for a century and a quarter, which always follows the same law, takes the same course and reaches the same terminus and conclusion in the end, finding a boundary in a federal constitutional purpose, instead of a purpose in the boundaries of state power, is a safer guide and more sure than narrow deductions from individual cases. It is not that the supreme court changes its position. The position from which the court views the subject changes with the march of events and the stream of constitutional practice which brawled over obstacles in its early torrent flow, broadens and widens into the serene stream which carries unchallenged the exercise of federal power as it reaches the common ocean over which only this jurisdiction extends.

We may be certain that what has been will be, and in the end, the power to regulate commerce between states (so long left dubious and fragmentary) will in due time include under its regulation the entire body of corporate existence whose presence so perturbs the course of this commerce as to perturb federal regulation. When this is clear, the federal regulation of such corporations will come because the court will be considering not the share of these corporations in such commerce large or small, but an effective regulation by the central government and the steps needed for this. In the end the ox-hide of federal power is always cut into strips when the permanent boundary comes to be made.

This deep and assured conviction that Congress would finally legislate upon the great corporations and combinations, I found

pervaded the conference on trusts called at Chicago in the last week of October by the National Civic Federation, to my connection with which I owe my presence on this platform,¹ attending it as I did as a delegate from this state appointed by the governor. Possessing no substantive powers and in none of the customary and organic senses of the word representative, it included delegates appointed by the chief executive of most of the states in the Union interested in the subject, state officers and the counsel of the federal government engaged in the regulation of railroads and the prosecution of trusts, the counsel of many of the larger railroads and corporations, and delegates from the trade combinations, like the National Druggists' Association and labor unions, including the American Federation of Labor and various farmers' organizations. Such a body represents without being representative. Such a body, having no legislative responsibility and no party responsibility, met for opinion and not for action, is, as every journalist comes to know, a better gauge of public sentiment at any given moment than bodies of real power and actual importance. Having to act, these latter and their members must be careful of expression; but a conference like that which met in Chicago reflects and mirrors with great accuracy the average and widespread opinion of the day, before it crystallizes into law, when all can see the record and expression of authoritative public opinion finally expressed in statutory form.

No one could be a member of this body, meet its membership, share its deliberations and share in the work of securing an unanimous expression of opinion from its diverse membership, without securing an invaluable impression of floating opinion. Such a conference, if its members come to a common opinion, expresses exactly and accurately what people would like to have, before the bulky, cumbrous and official action of national parties and the national legislature has acted and enacted law.

The Chicago Conference on Combinations and Trusts of the National Civic Federation made perfectly clear what I believe is the settled purpose and resolution of the American people, that there shall be no combination without regulation. The decision of the Supreme Court on the boycott in the Danbury hat case has put this popular resolution into judicial form, and the support and approval

¹This paper is a revision and enlargement of an address delivered at the Annual Meeting of the Academy, April 11, 1908.—EDITOR.

given this decision and the widespread opposition to any proposed legislation modifying or seeming to modify this decision shows how near it is to public conviction. Whether in capital or labor, whether in railroads or industrial corporations, whether in distributing agencies, trade associations like the druggists' or farmers' associations, combination without regulation will not be permitted by the American people. Combination, to any size, any extent and any purpose not prohibited by law, the American will accept. The mere size of anything never daunts him. He is used to big things. But combination which is not regulated he will not permit. The real choice is not whether there shall be regulation or not; but whether this regulation shall be by and through a criminal statute, the Sherman Anti-Trust Act of 1890, or through administrative regulation and supervision. The whole body of combinations, railroad and industrial, of labor and of farmer, of wholesaler and retailer, have no choice between regulation or not; but between the drastic operation of the criminal courts through this federal law and similar state statutes or reports to and supervision by orderly civil machinery. One or the other there will be, because combination without regulation our people and public will not permit.

In English jurisprudence, a directly opposite movement has been in progress. In this country, twenty-three years ago the New York Court of Appeals by its decision on the Sugar Trust, broke up a system begun for the combination and consolidation of corporations in Ohio a score of years earlier. This decision has been accepted as law in almost every state. Legislation followed under the attention directed to the subject by a decision which left no course open but the corporation directly owning the consolidated properties in any new combination. The "holding corporation" remained a convenient screen until its standing was left in doubt by the decision of the Supreme Court in the Northern Securities case. In interstate commerce it remains secure to-day, only on evidence showing that it was not intended to end any competition. A similar conclusion would probably be reached by most state courts of last resort. The act of 1890, the Sherman Anti-Trust Act, is but one of a network of legislation covering all our states. Of varying character these laws and the decisions and prosecutions over them have extended, as already shown, to every branch of trade. Little of what the common law permitted in combination in restraint of

trade is left. How much even this was, the wise man will not too strictly define. What the cankerworm of federal law and its interpretation and administration has not destroyed, the caterpillar in the branching tree of state jurisdiction has eaten. If a combination in restraint of trade lives at peace in this country, it is not without apprehension, and those called to a close acquaintance with the managers and the counsel of our great combinations in industry and transportation, know best their manifold anxiety. I speak with knowledge when I record that in the past five years, the great and most conspicuous corporations in both fields, in and out of interstate commerce, have been solemnly advised that past decisions, state and federal, have only to be pushed to their full legitimate logical conclusion to challenge the security of any corporate combination from the United States Steel Corporation and the Pennsylvania Railroad down. No such "badge of sufferance" has ever been imposed by law on capital in modern history since the Jew was baited from York to Venice, by Plantagenet and Doge alike. Not in our history has there been on any subject of mingled moral and economic, social and legal relations such general unanimous and universal exercise of the law-making, judicial and law-enforcing power since the legislation from 1820 to 1860 on chattel slavery, and this was divided into two opposing purposes—North and South. The national resolution that there shall be no combination without regulation enters every state, controls federal laws, decisions and prosecutions for eighteen years.

In the very same period England has been relieving combinations of every order, even from the regulation familiar in the past under the common law. The sweeping doctrine laid down in the case of the *Mogul S. S. Co. vs. McGregor* (1892, A. C. 45 and 23 Q. B. D. 598), at the same time as the passage of the Sherman Act, controls English courts. When a court of last resort can, as in this case, reach the conclusion that a group of common carriers trading on the high seas can agree to refuse all freight from a shipper who sends any goods by a ship carrying freight at less than the rates agreed upon by the combination, any agreement in restraint of trade is possible. The reasoning in this decision distinctly reaches the conclusion that in trade, agreements cannot be divided and discriminated. All must be accepted alike as long as the end is directed to an increase and promotion of trade. As long as the trade itself is

justifiable, any combination to increase traffic is permissible. In dealing with Trade Unions, the English courts had reached a similar view in *Allen vs. Flood* (1898, A. C. 1), practically establishing the rule that neither the officers nor the members, neither the society nor its funds were responsible for acts injurious to a third party. As soon as this was modified in *Quinn vs. Leatham*, House of Lords, August 6, 1901, with reference to crimes on an appeal from an Irish jurisdiction and for civil damages by the Taff Vale case (*Taff Vale Railway Company vs. Amalgamated Society of Railway servants et al.*), in 1901, a steady agitation followed, which has ended in legislation, both political parties agreeing, which the House of Lords accepted, its law lords vainly protesting.

On most subjects, as every one knows, the broad currents of English and American law, flowing from the same fountains, flow in separate channels but to the same purpose and intent. On most points of principles the courts agree and statutory assimilation is more frequent and constant than most realize. Each system is constantly borrowing from the other. But in the past twenty-five years, in which this precise issue has loomed large on the horizon of modern trade, English courts and legislation have reduced or removed altogether common law restrictions and American courts and legislation have increased them. In England, any trade or labor combination is to-day permissible, and the decisions in regard to common carriers by no means enforce impartiality to all, unless required by statute. In this country, the suppression of combination grows more and more drastic. As every one knows, combinations accepted without challenge thirty years ago are to-day not only penal by statute, but the courts in construing these statutes have matched mediæval tribunals in dealing with the forestaller and regrater.

It is a matter of common knowledge, that in the period of development in railroads, industries and distribution after the Civil War, from 1865 to 1881, when the first agitation began, railroads, without challenge, granted rebates, discriminated in rates, agreed on rate sheets and pooled their receipts, manufacturers combined on prices and divided territory, wholesalers and retailers united to preserve the margin between wholesale and retail prices and refused goods to those who broke scheduled prices. These were all openly and publicly done for a score of years. These acts and this policy

were accepted by the public. The records of more than one of our great corporations will show that counsel advised that these practices were legal. At least one railroad, a party to the notorious contract on oil freights with the Southern Improvement Company, was advised by its solicitor on that contract that it had a right to sell its transportation at different rates to different customers as freely "as a grocer sells sugar at different prices." The whole range of methods now condemned and prosecuted was accepted without interference by courts or legislatures for years. One reason for the extreme bitterness among capitalists over sixty years of age is that they find themselves pilloried and prosecuted for acts once the accepted path to railroad profits and business success. The prospect that the United States would reach the conclusion and conviction on all these issues, to-day established in English law was, up to thirty years ago, stronger in this country than in England.

If the two lands have divided on this vital social issue, the reasons rest on their social fundamental organization. Combination has been accepted without regulation in England because the entire English social system is a series of closed groups. The peerage itself constitutes one such body enjoying special legal privileges descending by the same law as realty inheritance. The church as by law established enjoys exclusive non-competitive privileges unknown to the religious life of Americans. Public education, even when supported by taxation, passes under the control of religious bodies in England, associated for this purpose and jealously excluding interference to an extent alien to all our conceptions of the common school, whose essence is its freedom from any control by individual combination. The English union enjoys a power, excludes non-union competition and is accepted by the public and the law as a combination having rights of monopoly control to an extent unknown in the United States.

Combinations, without regulation, special monopolies of privileges, legislative, ecclesiastical, in education, in industry and in labor, exist at many points in the English social organization. This is none the less true because in certain specific instances, as the American Tobacco Trust, the retailers' privileges were defended by the public. The retailer is himself organized in a closed group in England, socially and economically. His discounts are protected, where here, in a series of decisions, the retailer's right to protec-

tion from cut-rate competition and the wholesaler's power and policy to furnish this protection have been swept aside by federal and state courts.

English society is stratified and cellular, full of "ductless glands," if I may borrow a physiological simile whose play and working are of the utmost value to the body politic. What is royalty itself but just such a ductless gland developed and inherited through a long period, surviving all changes and discharging a special function indispensable to the healthy working of the British organism.

Our American social organization knows none of these things. It has no place in all its system for any closed group. It is jealous of them. Any combination which assumes to be superior to regulation arouses an instant antagonism. Having traveled even farther than England along the path of organized combination, with the prescient, prophetic, penetrating wisdom of a democracy, the American people suddenly halted a little over a score of years ago. Agitation and investigation laid bare the tendencies towards combination. Through all its agencies, state and federal, and through every power and function known to these twin agencies, legislative, executive and judicial, there has been a sudden reversal of earlier acquiescence and instead prosecutions, which ran to the boundary of persecution, have asserted the national instinct and determination that there should be no combination without regulation.

It is the fashion to treat the Sherman Anti-Trust Act of 1890 as if it were sporadic, passed without knowledge or consciousness of its scope and sweep. If this means that in 1890 no one expected to see railroad and industrial corporations which had been growing in power and might for twenty-five years, since the Civil War, brought under an absolute control which has shocked European and English financial opinion by its relentless penalties, this is perfectly true; but if any one imagines that this act did not respond to and express a national purpose as wide, deep and persistent as any in our history, he misreads the record. If the Sherman act had been a mere accident, running counter to the deeper national purpose, the courts would have minimized it, as our courts have so often dealt with the legislative vagary of the day; but as all know the crucial decisions on this and like laws by courts of last resort, at Washington and elsewhere, have had the precise quality that the law (up to the decision carrying a step farther the regulation or prohibition of competition destroying combination), had been such as to leave

the court open to go either way. Uniformly, the corporation view has lost. This common action in both fields of our complex system and through the triple instrumentalities of each, never takes place and never can take place, unless something more fundamental than opinion or even law is at work—a primal national instinct.

When the National Civic Federation called its first conference on trusts in 1903, it was impossible to secure from that gathering any common action. No resolutions were passed, because the general national purpose was not yet clear. The conference which met last October at Chicago was precisely such a body as might have been expected to break up again without result. It was heterogeneous, it had no common purpose or standard, and at heart half of its members had strong personal interests, through their connection with railroads, trusts, unions, granges, commercial associations and federal and state governments. If this body reached a common conclusion, it is because the popular will is now clear as to the regulation of combination. The only error was in not seeing how universal and without exceptions their purpose was. It was generally accepted, and the committee on resolutions included men in each category mentioned, that railroad combinations could be permitted under the supervision of the Interstate Commerce Commission, that the great industrial corporations, "Trusts," must be classified, and such as affected interstate commerce so as to affect its federal regulation must pass under the supervision of the Federal Bureau of Corporations, that commercial associations, maintaining wholesale and retail discounts, must be given the common law rights vouchsafed them in the past, before the Sherman and state acts treated the protection of discounts as a restraint of trade, and that unions and granges, since they were not organized for profit, should be permitted combination in interstate commerce without regulation and supervision.

This briefly summarizes the declaration of principles adopted by the Chicago conference of 1907; but as differences existed on details, it was agreed to urge on Congress a commission to report after the presidential election, as action before such a contest could not be reasonably accepted. The result in Congress has shown that not even the pressure of President Roosevelt's administration could secure the passage of any legislation at a session from which every member of the house looked forward to his approaching election.

A commission might have been secured and would have educated the public. As it is, the measure introduced by Representative Hepburn followed the outlines of the Chicago program as drawn in a bill by the committee on legislation of the National Civic Federation, remodeled by the Federal Bureau of Corporations, considerably increasing its power, with a section intended to protect the unions and granges, one combined to protect the price of labor and the other to protect the price of farm products, from the possible consequences of the Supreme Court decision in the Danbury Hat case, though not on the labor boycott in interstate commerce.

But this section served the remarkable purpose of showing that all concerned had failed to understand how inexorable was the national determination that there should be no combination without regulation. If there has been anything taken for granted in discussion and conference on this subject by congressmen and economists, by the learned counsel of great corporations and the heads of unions, by newspapers and by federal officials from President Roosevelt down, it has been that legislation permitting combination to railroads and trusts, under adequate supervision, would pass all the easier if it relieved unions and granges from their anxieties under the Sherman act.

Nothing of the kind. The instant it became clear that the ambiguous section already noted above might free unions from the Sherman act, the measure which held it was halted. When the Supreme Court in the boycott decision held a union to exactly the same responsibility as a trust under the Sherman act, the House of Representatives could not, like the House of Commons, be brought to free the labor organization from responsibility for its acts. Representatives were overwhelmed with protests which made them, from Speaker Cannon down, clear that the law must stand as the Supreme Court left it. What every one forgot was that, while the American Federation of Labor has 2,000,000 members, there are 1,400,000 separate stores and establishments in trade, and each one of these has a stronger voting power than a single member of a union. "Organized labor" is really outvoted by commercial establishments. The practical result is that federal law, so far as it affects combinations of labor or of capital through injunctions or prosecutions, remains unchanged, though alteration was urged together by the joint efforts of labor and of capital. Small establishments, ex-

pressing and urging the national conviction that there must be no combination, not even of labor or of the farmer, without regulation, prevented all legislation, whether asked by railroad, trust, commercial association, union or grange.

Legislation is, however, inevitable. The choice to-day for combinations is no longer after the past eighteen years, since the Sherman act, between regulation or no regulation, but between regulation by criminal prosecution and regulation by administrative supervision. The first is in full operation. Every decision widens its scope. Every prosecution and conviction advertises and enforces its perils to all combinations. Ten years ago, the great corporations were opposing federal supervision. Twenty years ago, the decision in the Knight Sugar cases seemed likely to render the extension of federal power over manufacturing corporations impracticable and unconstitutional. To-day, many lawyers advising trusts would, I know, be glad if that decision were out of the way and their charge safely at anchor in the haven of federal regulation. As for the counsel of the government, the plea of Mr. Hoyt, Solicitor of the Department of Justice, sufficiently shows the belief of official legal advisers that the Supreme Court, if a path of retreat, not too patent, be opened, will silently withdraw from its position in Knight's case and lay down the wiser doctrine, that where the operations of a corporation require regulation in order efficiently to regulate interstate commerce, it must pass under Federal regulation so far as the efficient discharge of the constitutional power to regulate commerce between the states renders this necessary.

An industrial corporation, using the term in its broadest sense, of companies engaged in production, manufacture, mining or distribution, comes within the purview of federal jurisdiction through its relation to interstate commerce. This relation may arise in two ways, the corporation may be directly engaged in this commerce, or its operation may be on a scale sufficiently large to render the regulation of interstate commerce ineffectual, unless the corporation itself be under supervision. On this latter principle the federal power has already been extended to fields in themselves wholly outside of federal jurisdiction. A navigable river, like the Ohio, bed and stream, is under the sovereignty of the states it divides or through which it flows. The federal government has no such interest in either as justifies control over them, as the Supreme

Court has just held in the Colorado River case; but the regulation of interstate commerce has extended a plenary federal jurisdiction over bed and stream, as far as it is necessary to improve the navigation by condemning private property, protecting work from trespass or deciding at what price a private enterprise engaged in improving navigation can part with its title. President Monroe challenged this right in his familiar message, whose chief weight and value to-day is the measure its law and logic offers of the complete reversal by the national courts, legislature and executive of his position. Perpetually one returns at all points to the principle that whatever the federal government needs for the complete exercise of a granted power, it can take and hold and its courts, in a constantly enlarging jurisdiction, decide the boundaries of this power and the mode under which it arises.

Federal power is clear where an industrial corporation is engaged in interstate commerce; but in the application of this power to a corporation, the issue at once arises as to whether the exercise of jurisdiction is limited to its interstate commerce alone, or can be extended over the operation of the corporation as a whole. If the former cannot be exercised without the latter, the latter will follow. In the measure drawn by the National Civic Federation, it was assumed that federal regulation would extend only to interstate business. Federal law and prosecution have for eighteen years infringed upon or threatened this traffic of industrial corporations through a penal statute, the act of 1890. The principle therefore adopted in the measure proposed was of the nature of an act of provisional indemnity. If these corporations made certain reports and submitted their contracts for approval to the Bureau of Corporations, they were to be free from the operation of the Sherman Anti-Trust Act. If they failed, either in their reports or in securing the approval of this bureau, the provisions of the act revived. While an unusual proceeding in American law, the group of decisions dealing with amnesty at the close of the Civil War leaves no reasonable doubt that a discretion as to the enforcement of a penal statute, even when, as in the case of treason, it applies to a constitutional crime, can be vested by Congress in the executive officer whom it selects by appropriate legislation to exercise this discretion. But while the principle is constitutional, it has not yet commended itself either to Congress or the newspapers. The discretionary suspen-

sion of a criminal statute on certain conditions, however constitutional and however desirable in itself, is not customary.

Three classes of corporations or associations were embraced in this provision for suspending the Sherman Anti-Trust Act, railroads whose contracts were to go for approval to the Interstate Commerce Commission, corporations in trade, industrial or distributive, whose contracts were to be passed upon by the Bureau of Corporations, and labor unions and granger associations combining to maintain prices of farm products, whose contracts were to be submitted to no one. To the reference of railroad contracts to the Interstate Commerce Commission no objection was made in Congress or out, though Western dread of "pooling" has prevented any favorable action. To the approval of contracts by industrial and trading corporations or associations, the wide and general protest was made, already voiced on this platform by Mr. John Sharp Williams. To the freedom from all scrutiny of contracts affecting interstate commerce made by unions, there was an opposition no one anticipated. Instead of aiding the passage of the measure, this provision seriously increased opposition by awakening protests already touched upon.

Strictly legal in character, this framework of regulation, efficient, adequate and constitutional, satisfactory to the interests involved, protecting the public, revised and approved by President Roosevelt and his administration, still had to the journalistic eye the fatal lack that to the average man it seemed a vulgar barter of immunity to combined capital or labor, which combination, but for its provisions, would be open to criminal prosecution. This is an unfair and ignorant view; but it has to be reckoned with. The *nulli justitiam vendimus* of Magna Charta lies deep in the conscience of the English-speaking folk, and while its common and conscious opinion will accept amnesty for a political crime like treason, men gag at immunity from a criminal statute, directed against what is universally held by the average American to be morally indefensible and an offense against the higher social order—a combination in restraint of trade. Next winter, this measure comes again before Congress after the clarifying effect of a Presidential canvass. Public opinion will be better known, the insensible education of public men and of newspapers will have progressed another stage and what can and cannot be done have become more

clear. But whatever be the final outcome of the first measure which has the joint approval of capital, labor and the federal administration ever presented to solve the problem of regulating corporate combinations in capital, in farm production and labor, in and out of interstate commerce, on the borderland between state and federal jurisdiction, the bill presented by the National Civic Federation is the first mediating word on this most difficult crux of our system. It blunts no criminal weapon now possessed by the federal power, it asks of the industrial corporations chartered by states enough supervision and regulation to protect the public, but no more than the corporations are ready to concede, and it raises no dubious constitutional issue. The sole question and the chief opposition has turned upon the treatment of the labor unions, and this is solely because at one point, to wit, in contracts made by unions, it permits combination without regulation. This, I firmly believe, the American people will as little sanction for labor as for capital.

The measure of the National Civic Federation deals with the regulation of trusts on the side of and through their interstate business. This is the constitutional vinculum by which is joined federal power and the producing or manufacturing corporation, and beyond this the bill does not go. But the real cause and reason why these corporations need federal regulation is not because they are in interstate trade, but because their share in interstate commerce is so large, pervading and perturbing, that federal regulation of commerce between the states is futile and ineffectual unless they are regulated. There are tens of thousands of corporations engaged in commerce between the states which no one proposes to regulate. The measure just analyzed in theory and as a mere matter of bill-drawing, would apply to every association or corporation which sends a newspaper or ships a can of milk across a state line. In practice, no one expects that any but the large corporations, with special interests to protect, will avail themselves of its provisions. The obstacle and objection to all general measures bringing under federal regulation all corporations in interstate commerce rests on the grave inconvenience of requiring reports from the great array of small corporations, imposing an intolerable burden both on them and on the federal authority charged with their regulation, when all that is really required by public policy is the regulation of the greater corporation. The practical reason for regulating any great

industrial corporation is its disproportionate share of interstate commerce. The constitutional reason attaches to any share any corporation has in such trade, however small. No classification has yet been proposed which solves this difficulty. If the size of capital be made a basis for the regulation of a corporation, this provision can be readily evaded and its constitutional character is open to grave question. The proposal has been made by Mr. William J. Bryan, among others, that the share by any corporation of the total product of the country turned out by an industrial corporation ("trust") shall decide whether it pass under federal regulation or remain free.

As hitherto proposed, this is a mere arbitrary measure (Mr. Bryan's proposition was twenty-five per cent), for which the judicial mind has small respect in deciding the varying boundaries of constitutional jurisdiction. Classification, however, as a means and method of applying constitutional authority, the courts of last resort have always respected and accepted. This classification must not be arbitrary and evidently directed to secure a predetermined end, as the Supreme Court of Ohio held when the legislature endeavored to "classify" Cincinnati, Cleveland and Toledo on the exact basis of their population in 1900, down to a few score. If, however, the classification be natural and normal, growing out of the subject matter, if it be impartially applied without the earmarks of biased purpose—to which the courts are often blind when not forced upon them—and if a sliding scale, capable of numerical application in the future by adequate and proper authority, legislative, administrative or judicial, be provided, our courts have repeatedly accepted and generally with a favorable understanding, such classification as both a convenient and constitutional method of drawing the boundaries of jurisdiction and action.

None will question, if one corporation produced and controlled all of a great industry in the national area, so that the regulation of transportation in that industry consisted solely of the consideration of its contracts and operations, that a plea for the right of the federal authority to regulate that corporation would rest on a far firmer basis than if this product were divided between thousands of corporations, no one of which dominated the trade or was in a position wholly to deprive any railroad system of a lucrative freight by billing all its shipments over other lines. Were any one industry

wholly controlled by one corporation, it would, as every one is aware, be practically impossible to prevent rebates, rates, public in form and secret in fact, special advantages which would increase profits, inordinately low charges which stifle the cost of transportation to less highly organized industries and special privileges for the monopoly which would swiftly and secretly suppress competition. To how great an extent this is already true of the Standard Oil, recent trials have judicially established.

Given a number of leading industries, so integrated, each under a single control and all united by a community of interest, secured by the presence of members of allied financial groups on their boards of direction, and the maintenance of equal, equitable and public railroad charges would be impracticable, unless the regulating authority could also regulate, investigate and lay bare the operations of these corporations. Control of the railroads alone would not suffice to discharge the duties and responsibilities of the federal government in regulating commerce between the states. Nor would it be difficult to establish this proposition by legal evidence, cumulative and convincing.

Were Congress, acting on such evidence, to draw, as has been proposed, the arbitrary line of twenty-five per cent of the product of the country as justifying the federal regulation of a trust, it might be neither easy to establish that this was the right line nor to deal with the evasion due to keeping product just below the point at which federal regulation of industrial corporations would begin. But if Congress were to provide for classifying corporations, by dividing them between those manufacturing or producing or vending—let us say seventy-five, fifty, twenty-five and ten per cent of the total national product, graduating the severity of regulation, scrutiny, publicity and the contracts sanctioned by appropriate authority, so that publicity was greatest and the burden of regulation—as to equal prices, for instance, in all parts of the country for standard articles—heaviest on the corporation producing seventy-five per cent, this regulation decreasing as the share in the total product diminished, it is plain that the constitutional plea for such a classification would be strengthened. The courts might well hold on such legislation that Congress had a right, as a matter of public policy, to decide on the necessity for regulating industrial corporations, not directly engaged in transportation, in order effi-

ciently, adequately and equitably to discharge its duty of regulating commerce between the states, that Congress had the power to classify these corporations for this purpose in proportion as they rendered such regulation difficult by their larger share in the total product, and that this classification and the legislation provided under it could justly and constitutionally be adjusted so as to aid competition and discourage the perturbing size of these monopolies.

The machinery for such action and such a policy has already come into existence. The Census Bureau follows year by year the national product in each industry. Were the share enjoyed by each corporation or combination certified to the Bureau of Corporations, already collecting reports and having power to investigate, trusts would be classified yearly. Once classified, the Interstate Commerce Commission could be empowered to carry out the special regulation imposed on each class. The classification might admit of some evasion in passing from class to class, but all corporations large enough to derange the federal regulation of rates for transportation would be included and the multitude of lesser corporations would escape wholly the onerous regulation imposed on larger monopolies and semi-monopolies. Such a regulation would rest on the constitutional right to regulate commerce between the states. It would divide and discriminate—as is now done in the improvement of navigable and non-navigable streams—between corporations which require regulation and those which do not, because one related and the other did not to the regulation of commerce. The classification would be based on a census bureau enumeration or record of total national product and the share controlled by a combination, an enumeration which would act automatically and through a measure capable of verification, that is, of being established as any other issue of fact can be, if disputed, by a legal process. From year to year, this classification would be determined by the records and inquiry of the Bureau of Corporations. The classification of a corporation once established, it would pass under the same authority, as to its prices, contracts and operations, as the railroads, whose freight rates, its unregulated activities so certainly and injuriously derange and deflect from open, equal and just charges to all for the same transportation.

Such a system of regulation applied to all the various combinations which impinge upon the various agencies, railroad and other,

which carry on transportation between the states, would apply to each such agency as required. Each combination or corporation, whether it was mining, manufacturing or distributing, whether it represented capital or toil, the integration of an industry, the organization of labor, the maintenance of prices for agricultural products or of the margin between wholesale and retail prices, would under this plan and system be subject to a constitutional control which would leave no combination without regulation, whenever that combination was large enough to require regulation. The great multitude of lesser combinations, the multitude of lesser agreements in restraint of trade could be left to the regulation of the ordinary laws of trade and the statutory regulation of the states under the police power.

But the great combinations which to-day constitute a portent upon the national horizon would automatically pass under federal regulation. This would itself be part of that broad principle and working under our national system, which from the beginning of the American commonwealth has determined that there shall be no combination without regulation, such regulation being adapted in each case to the conditions of combined social forces, local, state and federal, each finding its appropriate governance. If the "trust" to-day awakens alarm, it is because it offers combination without regulation. Furnish this and alarm over its size will disappear. Leave it without this and the open injustice of unregulated combination will breed a challenge to the established order.

[NOTE.—While this paper is passing through the press, the National Republican Convention has made the Hepburn Bill a party measure by incorporating its principles in the Republican platform. The use of the criminal powers of the Sherman Act of 1890 in order to secure assent to federal supervision is made party policy; but the convention wholly refused to except trade unions from this proposed regulation. This affords a striking example, by a political body seeking votes, of the refusal to permit combination without regulation, even when this action would estrange many voters.]

PART FIVE

Appendix



REPORT OF THE ANNUAL MEETING COMMITTEE

TWELFTH ANNUAL MEETING
OF THE
American Academy of Political and Social
Science

Philadelphia, April 10 and 11, 1908.

The four sessions of the Twelfth Annual Meeting of the American Academy of Political and Social Science attracted the largest number of out-of-town members in the history of the Academy's sessions. The topic was of such timely interest that the discussions were followed with the deepest interest throughout the country.

In this volume all the leading papers are printed in full, and it is, therefore, unnecessary for your Committee to do more than express to those who participated in the meeting its sincere appreciation for their valuable co-operation.

The thanks of the Academy are also due to the members of the Committee on Program, the local Reception Committee, of which Mr. Samuel F. Houston was Chairman; and to the standing Reception Committee, of which Mrs. Charles Custis Harrison is Chairman. We desire to make our acknowledgment to the University Club and the Manufacturers' Club, both of Philadelphia, for the courtesies which they extended to visiting members of the Academy.

We also wish to express our obligation to the Provost of the University of Pennsylvania and to Mrs. Harrison for their generous hospitality in extending the courtesies of their home to the guests of the Academy, and to Major Joseph G. Rosengarten, whose entertainment of the speakers on Saturday evening, April 11th, constituted one of the most delightful social occasions of the annual meeting. The Academy is also under deep obligations to those who contributed to the Special Annual Meeting Fund, which the Academy must raise in order to defray the expenses of the annual meeting.

In addition to the formal papers contained in the proceedings, we beg to append herewith the briefer remarks made by the presiding officers at the various sessions.

At the session of Friday afternoon, April 10th, Mr. Marcus M. Marks, President of the National Association of Clothiers, presided. The address of Mr. Marks on "The Effects of Anti-Trust Legislation on Business" will be found in the proceedings.

At the session of Friday evening, April tenth, the Honorable Charles P. Neill, Commissioner of Labor, Washington, D. C., presided, and, in introducing Judge Grosscup, spoke as follows:

"Ladies and Gentlemen: The subject of this evening's discussion is the relation of the government and the public to corporate development, a subject which has ceased to be academic, and is one of vital concern and of very direct interest. We are fortunate in having this evening, for our discussion, gentlemen who are very closely related to the problem itself and to the subjects of our discussion. The discussion will be opened by a paper on "The Government's Relation to Corporate Construction and Management."

The introductory remarks of the Honorable Martin A. Knapp, Chairman Interstate Commerce Commission, Washington, D. C., who presided at the session of Saturday afternoon, April eleventh, are printed as an article in the proceedings.

At the session of Saturday evening, April eleventh, the presiding officer was the Honorable James R. Garfield, Secretary of the Interior, Washington, D. C. In introducing Judge Hough, Secretary Garfield said:

"Ladies and Gentlemen: It has given me a great deal of pleasure to accept the invitation of the Academy to be present and to take part in this evening's discussion.

"Discussions of this character, conducted by such associations, cannot but be of the highest benefit to the people of the country in getting clear ideas on the great political and economic questions, and the interchange of thought between men from different sections of the country, holding opposite political beliefs, and engaged in different kinds of business, must contribute enormously to the elucidation of these problems which are before us to-day. This is particularly true of questions of an industrial character which have been presented by the Academy at this annual session.

"The questions before us to-night, those affecting the state and nation as units of control of corporations, are most vital and of the keenest interest at this time. It is not merely a revival of the question of the state or nation as to rights; not at all. There are, of course, rights involved, but I think in a greater degree we should consider the duties and obligations resting on the state and nation in respect to these industrial problems. It is certainly elementary that there is no right which any of us enjoy that is not based on the fulfillment of a duty first placed upon our shoulders, and we cannot secure those rights unless we are willing to assume the duties put upon our shoulders and fairly and honestly perform those duties. Therefore in any discussion which has anything to do with the place where the control should lie as between state and nation, we should look upon the duties and obligations of those two jurisdictions, rather than any rights either may claim."

At the close of Mr. Williams's speech, Secretary Garfield said:

"In regard to the increase of federal power referred to by Mr. Williams, our nation was the youth created by the Constitution of our forefathers. That Constitution had in it the germ of government which has since then developed. Increase comes from development of the germ within, as much

as by the addition from without, and therefore, we may have an increase of power without the addition of new power, by development along lines which are wholly within the original body, and this, I think, is very well suggested by what Judge Hough has said, to the effect that the power to control must be co-extensive with the subject sought to be controlled; hence, if we have agencies which are beyond the control, beyond the jurisdiction of the state, then necessarily it follows that control over these agencies, if effective (and I do not mean that it exists merely because it is needed), must come within the control of the greatest sovereign, the United States, because its power is co-extensive with the agencies at work."